

We well knowing the great Learning
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for the Publick Good, Allow and Ap-
prove of the Printing and Publishing
of the REPORTS of *WILLIAM*
SALKELD, late Serjeant at Law.

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REPORTS OF CASES

Adjudged in the

Court of King's Bench:

WITH

Some Special CASES in the Courts of
Chancery, Common Pleas and Exchequer,

Alphabetically digested under Proper Heads;

From the First Year of K. *WILLIAM* and Q. *MARY*
to the Tenth Year of Queen *ANNE*.

By *WILLIAM SALKELD*,
late Serjeant at Law.

With Two Tables; the one of the Names of the Cases, the
other of the Principal Matters therein contained.

VOL. II.

Allow'd and approv'd of by the Lord High Chan-
celloz of Great Britain, and all the Judges.

Being the most useful Collection of Cases for Justices of Peace, and also for
Barristers, Students, and all Practisers of the Law.

The Fourth Edition, with many Thousand additional References

By *KNIGHTLEY D'ANVERS*, late of the Inner-Temple, Esq;
Author of *The General Abridgment of the Common Law*.

And the Pleadings now first done into *English*.

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7

NAMES of the CASES in the Second Volume.

A			
A	<i>Bbot versus Burton</i>	Page 590	
	<i>Acebery v. Barton</i>	693	
	<i>Aſton v. Eels</i>	662	
	<i>Adams v. Tertenants of Sa-</i>		
	<i>vage</i>	601, 679	
	<i>Adlame v. Colebatch</i>	491	
	<i>Allen v. Brookbank</i>	625	
	<i>Alleyne & ux' v. Grey</i>	437	
	<i>Allington v. Vavaſor</i>	455	
	<i>The Caſe of the Pariſh of All-Saints</i>		
	<i>and St. Giles's in Northampton</i>	530	
	<i>Aloſſ v. Scrimſhaw</i>	573	
	<i>The Caſe of the Pariſh of Amner</i>	475	
	<i>The Caſe of Andover</i>	433	
	<i>The Caſe of St. Andrew Holbourn and</i>		
	<i>St. Clement Danes</i>	494	
	<i>Lord Angleſey v. Lord Altham</i>	676	
	<i>Argent v. Sir Marmaduke Darrel</i>	648	
	<i>Armitt v. Breame</i>	498	
	<i>Arnold v. Jeffreyſon</i>	654	
	<i>Arnott v. Browne</i>	425	
	<i>Arthur's Caſe</i>	495	
	<i>Alcomb. v. the Hundred of Spelholm</i>	613	
	<i>Elizabeth Aſhley's Caſe</i>	479, 480	
	<i>Aſhmead v. Banger</i>	638	
	<i>Aſhmole v. Serjeant Goodwin</i>	624	
	<i>Sir Samuel Aſtry's Caſe</i>	651	
	<i>Aſhwin v. Corill</i>	650	
	<i>The Attorney General againſt Baden</i>	495	
	<i>Attwood v. Bur</i>	603	
	<i>Baker v. Pierce</i>	695	
B			
B	<i>ALL v. Manucaptors of Ruſſel</i>	602	
	<i>Lord Banbury's Caſe</i>	512	
	<i>Bates v. Grabham</i>	444	
	<i>Inter the Pariſhes of Beckenham and</i>		
	<i>Camberwell</i>	525	
	<i>Inter the Inhabitants of Bedenham and</i>		
	<i>Kingſton Bouſy</i>	486	
	<i>Lord Bellamont's Caſe</i>	625	
	<i>Bennet v. Talbot</i>	609	
	<i>Berkly v. Hanſard</i>	559	
	<i>Inter the Inhabitants of Berry and A-</i>		
	<i>rundel</i>	479	
	<i>Billings v. Eades</i>	Page 612	
	<i>Birch v. Wood</i>	506	
	<i>Blackmore v. Tiddersley</i>	423	
	<i>Blanchard v. Galdy</i>	411	
	<i>Bond v. Gonſales</i>	445	
	<i>Bofon v. Sandford</i>	440	
	<i>Bragg v. Digby</i>	658	
	<i>Branthwayt v. Blackerby & al.</i>	544	
	<i>Bredon v. Gill</i>	555	
	<i>Brewſter v. Kitchell</i>	615	
	<i>Inter the Pariſhes of St. Bride's and</i>		
	<i>St. Saviour's</i>	533	
	<i>Inter the Inhabitants of the Precinct of</i>		
	<i>Bridewell and Clarkenwell</i>	525	
	<i>Briggs v. Adams & al.</i>	674	
	<i>The Caſe of the Mayor and Aldermen</i>		
	<i>of Briſtol</i>	650	
	<i>Brook v. Biſhop</i>	639	
	<i>Broughton v. Langley</i>	679	
	<i>Brown v. Corniſh</i>	516	
	<i>Browne's Caſe</i>	544	
	<i>Buckley v. Palmer</i>	430	
	<i>Budd v. Berkenhead</i>	420	
	<i>Bullock v. Parſons</i>	454	
	<i>Sir James Butler's Caſe</i>	596	
	<i>Buxendin v. Sharp</i>	662	
	<i>Byron v. Elmer</i>	693	
C			
C	<i>Adbery Pariſh v. Bradon Pariſh</i>		607
	<i>Carmarthen (Marqueſs his Caſe)</i>	451	
	<i>Carter v. Sheppard</i>	507	
	<i>Cary & ux v. Stephenſon</i>	421	
	<i>Inter the Inhabitants of Chalbury and</i>		
	<i>Chipping Farringdon</i>	488	
	<i>Chambers v. Sir John Jennings</i>	553	
	<i>Chance v. Weedon</i>	628	
	<i>Charnock's Caſe</i>	31	
	<i>Chetly v. Wood</i>	659	
	<i>The Caſe of Cheſterfield</i>	479	
	<i>Inter the Inhabitants of Chittinſton and</i>		
	<i>Penburſt</i>	473, 475	
	<i>Chriſt's Hoſpital Caſe</i>	485	
	<i>VOL. II.</i>	a	Clay-

A Table of the Names, &c.

Clayton v. Kynaston	Page 573	Dunkley v. Wade	Page 658
Clerk v. Udall	649	Dunn qui tam v. Hinchdy	612
Clithero v. Franklin	568	The Inhabitants of <i>Dunsford</i> and <i>Ridge-</i>	
<i>Inter the Inhabitants of Cockfield and</i>		<i>wick</i>	538
<i>Boxstead</i>	477	E	
Coke v. Evans	453	E Arle v. Payne	550
Combs v. the Hundred of <i>Bradley</i>	613	<i>Inter Inhabitant' Paroch' Eaton</i>	
Cooke v. Foster	455	<i>Bridge & Inhabitant' Paroch' We-</i>	
Cooke v. Remmington	498	<i>fram in Canc'.</i>	487
Cooke's Case	634	Edgeberry v. Stephens	447
Cockcroft v. Smith	642	Elliott v. Callow	597
Cope <i>contra</i> Cope in <i>Canc'</i>	449	<i>Inter the Parishes of Evelyn in Oxford-</i>	
Corbet v. Tichborn	576	<i>shire and Rentcomb in Gloucestershire</i>	
Coundel v. John	504	Ewer v. Jones	417
Coventry v. Apsley	420	F	
The Mayor of <i>Coventry's</i> Case	429	F Anshaw v. Morrison	527
Cowper v. the Hundred of <i>Basingstoke</i>	614	<i>Inter the Parishes of Farrington</i>	
Coxeter v. Parsons	692	<i>Berks and Witney in Oxfordshire</i>	527
Cranburn's Case	633	Between the Parishes of <i>Farrington</i> and	
Cranmer's Case in <i>Canc'</i>	508	<i>Wilcot</i>	527
<i>Inter the Inhabitants of St. Giles's</i>		Fenwick v. Grosvenor	658
<i>Cripplegate and Hackney</i>	478	Sir Basil Firebrass's Case	558
Crocket's Case	669	Fitzhugh v. Dennington	587
Cromwell v. Grunsden	462	Ford v. Tilly	697
Crowther v. Oldfield	662	The Case of <i>Foxham Titbing</i> in <i>Co-</i>	
<i>Inter the Inhabitants of Cummer</i> and		<i>Wilts</i>	607
<i>Milton in Com' Berks</i>	528	Foxworthy's Case	507
Culliford v. De Cardonnel	466	Foy v. Lister	507
D		G	
D Arby v. Anely	660	G Alizard v. Rigault	507
Bishop of <i>St. David's</i> Case	549	G Gardiner v. Booth	507
Davies v. Salter	626	<i>Inter the Parishes of Gatton and M-</i>	
Davies v. Speed	675	<i>wick</i>	507
Davies and Carter's Case	461	<i>Inter the Inhabitants of St. George</i>	
Day v. Musket	640	<i>and St. Olave's Southwark.</i>	407
The Inhabitants of the Forest of <i>Dean</i>		Gerard (Sir Samuel) his Case	607
and Parish of <i>Lintot</i>	487	Gibbon v. Pepper	607
Deerley v. the Dutcheffs of <i>Mazarine</i>		Gilbert v. Parker	607
	646	Giles v. Hart	607
Dent v. the Hundred of <i>Hertford</i>	645	Glover v. Rogers	607
Dillon v. Harper	545	Goddard v. Smith	607
<i>Inter Inhabitant' of Dimchurch</i> and		Godfrey v. Llewellyn	607
<i>East-church</i>	480	Godolphin v. Tudor	607
Ditton's Case	490	Goodwin v. Peek	607
Dixon v. Willoughs	646	Gould v. Johnson	607
Dunkly v. Wade	653	Gray v. Hart	607
<i>Inter the Inhabitants of Dumbleton</i> and			
<i>Beckford</i>	5 470		

the Cases in the Second Volume.

Graves v. Blanchett	Page 606	Horn v. Lewin	Page 583
Green v. Goddard	641	How v. Prinn	694
Green v. Rivert	421	Sir Robert Howard's Case	625
Green v. Young	444	Hunt v. Burn	422
Greeves v. Roles	456		
Gregg's Case	596	I	
Inter the Inhabitants of <i>St. Nicholas</i>		Jacob v. Dallow	551
<i>Guilford in Surrey, and Killington</i>		Idle v. Coke	620
<i>in Suffex</i>	485	Jeffreys v. Legandra	443
H		Jenkin's Case	534
Hales (Sir Cristopher) v. Owen	625	Jenkyns v. Turner	662
Hadley v. Stiles	664	Jesson v. Collins	437
Halet v. Burt	580	Incedon v. Burgefs	636
Hall v. Wyburn	420	Incedon v. Crips	658
Hall v. Engleſton	515	The Case of Sylvanus Johnson	485
Hall v. Biggs	674	Jones v. Hart	441
Hammond v. Wood	563	Jones v. Pugh	465
Hardisty v. Barny	598	Jones v. Stones	550
Hard's Case	427	Jones v. Mills	640
Hare v. Chapman	636	Jones v. Morley	677
Harris v. Hicks	548	K	
Inter the Inhabitants of the Parishes of		Kempſtet v. Deacon	665
<i>Harrow and Ryſlip</i>	524	Lord Kilmurry v. Geery	338
Hartford v. Jones	654	King v. Burdet	645
Harvy v. Broad	626	The Case of the Parish of King Lang-	
Hatchill v. Griffiths	645	ley	605
Haths v. Ash	413	Inter Inhabitant' Kings-Norton in <i>Wi-</i>	
Hatton's Case	477	<i>gorn and Swolhill in Warwick</i>	481
Hawkin's Case	548	Kirkham v. Wheely	543
Haywood v. Davies & al.	629	Knight v. Farnaby & al.	670
Heathcoat's Case	670	L	
Hele v. the Bishop of <i>Exeter</i>	539	Langley Parish	605
Helvis v. Lamb	453	Lacy v. Williams	568
Elliot v. Selby	701	Ladd v. Widows	541
Enderson v. Foster	462	Lancaster v. Killingworth	628
Enly v. Walsh	686	Lane v. Saltmarsh	544
Ern contra Merick in <i>Canc'</i>	416	Lacy v. Kynaſton	575
Eylin v. Hoskins	422	Layton contra Manlove in <i>Canc'</i>	469
Field v. Woodſon	655	Layton v. Grindall	643
Field v. Partridge	424	Lazier v. Dyer	457, 650
Fieldmore v. Walker	653	Lee v. Drake	468
Field v. Vaux	656	Lee v. Millard	498
Field v. Hern	450, 671	Lee v. Strudwick	414
Field v. Baſſet	598	Leighton v. Theed	413
Field v. Young	610	Lenthal (Sir John) v. Cooke	438
Field v. Borough	658	Lethuillier's Case	443
Field v. Chapman	636	Linch v. Coote	469
Inter the Inhabitants of the Parishes of		The Parish of <i>Linfield and Battle</i>	605
<i>Horton and St. Mary Ax</i>	535	Inter Inhabitants of the Parishes of <i>Lis-</i>	
		<i>tle Kire and Woolfall</i>	530
		VOL. II.	a 2
			Lo-

A Table of the Names of

Lodie v. Arnold	Page 458	Parker v. Sir William Moor	Page 626
The Mayor and Commonalty of London v. Wilks	445	Pasmore v. Serjeant Goodwin	517
Longuevil v. the Hundred of Isleworth	498	Patridge's Case	552
Lover v. Salkeld	455	Paul v. Shaw	617
Lloyd v. Evelyn	568	Pierce v. Paxton	519
Lugg v. Lugg	592	Pierce v. Blake	519
Lug v. Goodwin	599	Pitman v. Maddox	690
M		The President and College of Physicians in London v. Salmon	451
M Achil v. Clark	619	Prideaux v. Morris	501
Machin v. Maultin	549	Prince v. Molt	661
Inter Inhabitants of Malden and Fleetwick	530	Proctor v. Johnson	601
Marle v. Make	508	Pullen v. Benson	621
Martin v. Crump	444	Purnal's Case	471
Mason v. Williams in Canc'	507	Putten v. Purbeck	561
Mathew v. Phillips	424	Pye v. George	681
Mathews v. Burdett	412, 672, 553	Prigg v. Adams	671
Sir Thomas Mears contra Lord Stourton in Canc'	512	R	
Morris's Case	497	The Inhabitants of Audley	521
Mills v. Wilkins	609	The Mayor of Abingdon	431
Minchamp's Case	491	Albertson	481
Inter the Inhabitants of Minton and Stony Stratford	527	Arthur	491
Monkton v. Pashley	638	Barebaker	471
Monopoly (Case of)	447	Barnard	501
Mood v. the Mayor of London	682	Barlow	601
Moverly v. Ley	558	Bear	411
Moor v. Manucaptor' Garret	566	Beard	471
Moor v. Watts	581	Bolt	581
Inter Inhabitants of Much Waltham and Penburst	473	Bear	611
N		Brown	411
N Newman v. Smith & al.	242	The Mayor of Coventry	411
Inter the Inhabitants of St. Nicholas and St. Helen	472	The Inhabitants of Long Chel	411
Norfolk (Duke) v. Alderton	668	Rex v. Crosby	611
O		Bishop of Chester	511
O Ldham v. Pickering	642	Daws	611
Lord Ossulston contra Lord Yarmouth in Cancellaria	449	Dobbyn	411
Oxenden v. Penrice	691	Flynt	611
P		Ford	611
P AGE v. Hayward	570	Gately	411
Palmer v. Price	589	Gregory	411
Palmer contra Poultney in Canc'	458	Greepe	511
Panton v. Hall	598	Geary	611
		Harding	411
		Hartford, Mayor, &c.	411
		Heaps	411
		Jones	411
		Johnson	411
		Ingram & al.	411

the Cases in the Second Volume.

Rex v.	Joslin	Page 587	Regina v.	Mason	Page 447
	Kemp	465		Nash	542
	Knollys	509		Norwich Mayor, &c.	436
	Leaver	587		Paty & al.	503
	Bishop of London and Dr.			Peach	572
	Birch	540		Rogers	425
	Bishop of London and Dr.			Smith	680
	Lancaster	559		Savin	605
	The Bailiffs and Burgeses			Solely & al.	594
	of Malden	431		Twitty and Maddicott	433
	Matthews	475		Whistler	542
	The Mayor of Norwich			Wigg	460
		432, 436		Winter	587
	North	565		Wooton Rivers Parish	402
	The Mayor of Oxon	669		Wrightson	699
	Parsons	499		Reading v. Royston	423
	Paris Slaughter	611		Richard v. Cornforth	580
	The Mayor of Rippon	433		Roberts v. Arthur	497
	Roswell	459		Roberts v. Harnage	659
	Randall	470		Robinson v. Stephens	616
	Shaw	482		Lord Rockingham & al. contra Oxen-	
	Toslin	587		den & al.	574
	Turnock	474		Roe v. Gatehouse	663
	Tippin	494		Roswel v. Pryor	460
	The Mayor and Burgeses			Rudd v. Morton	501
	of Wilton	428		Russel v. Comb	640
	Walcott	632		Inter the Parishes of Rysslip and Har-	
	Wilcocks	458		row	524
	Banks (Sir Jacob)	652		S	
	Baynes	680		SIR John St. Alban's Case	567
	The Inhabitants of Barking,			Salisbury v. Williams	497
	Needham Market, and			— v. Proctor	646
	Darmesden Hamlets	452		Salloway v. Whorewood	461
	Sir Jacob Banks	652		Lord Sandwich's Case	648
	Inhabitants of Buckingham			Savage v. Robery	694
		534		Saunders v. Owen	467
	The Mayor of Derby	436		Scawen v. Carret	545
	Dr. Drake	666		Scilly v. Garret	562
Regina v.	Ewer	564		Seaman v. Ling	668
	Ellis	595		Shires v. Glascock	ibid.
	Gouche	441		Shirley v. Wright	700
	Hedges	533		The Case of the Parish of St. Leonard	
	Harper	611		Shoreditch	483, 524
	Hereford, Mayor, &c.	701		Shorter v. Friend	547
	Bailiffs of Ipswich	434		Shortridge v. Lamplugh	678
	Langley	697		Shuttle v. Wood	564, 600, 659
	Layton	450		Smell contra Dee in Canc	416
	London	442		Smith v. Goff	457
	Maddox	613		Smith	

A Table of the Names, &c.

Smith v. Bramston	Page 644
— v. Frampton	<i>ibid.</i>
— v. Kemp	637
— v. Page	644
— v. Browne and Cooper	666
— v. Gould	<i>ibid.</i>
— v. Tindall	685
Smith v. Wood	692
Snow v. Firebrass	439, 457
<i>Inter the Inhabitants of the Parishes of</i>	
<i>South-Cadbury and Braddon in Com.</i>	
<i>Somerſet</i>	607
Sparks v. Spicer	648
Speed v. Perry	697
Star v. Rookesby	538
Starky v. Churchwardens of <i>Watling-</i>	
<i>ton</i>	547
Star v. Wade	647
Starrup v. Doderidge	657
Stephenson v. Arthur	544
Stephens & ux' v. Snow	578
Stokes v. Berry	421
Stomfill v. Hicks	413
<i>Inter the Inhabitants of Suddlescomb</i>	
<i>and Burwafſh</i>	491
Sutton v. Moody	556
<i>Inter the Parishes of Swanscomb and</i>	
<i>Shensfield</i>	492
Sweatland v. Squire	623
Symmonds v. Byngoe and Cook	496
— v. Cadmore	919

T

T HE Parish of <i>Talborn and Boston</i>	
	523
<i>Inter the Inhabitants of Talbury and</i>	
<i>the Hamlet of Foſton in Scropton</i>	
	476
Taffan v. Rogers	693
Tawny's Cafe	531
Taylor <i>contra</i> Wheeler <i>in Canc'</i>	449
<i>Inter the Inhabitants of Thackbam and</i>	
<i>Findon in Suffex</i>	489
Thompson v. Leach	427, 565, 576,
	618, 675
Thermolin v. Cole	646
Tomkyns v. Crocker	604
<i>The Cafe of the Churchwardens of</i>	
<i>Topſham</i>	484
Topſham v. Tollier	575

Tracy v. Talbot	Page 532
Tregame v. Fletcher	676
<i>Inter Paroch' Trobridge & Welſton</i>	473
Trowell v. Ellford	616
Tucker's Cafe	630
Tully's Cafe	598
Turbervill v. Stamp	647
Turner v. Beale	521
Turner v. Barnaby	566, 649
Turner v. Ogden	690

V

V Aughan's Cafe

W

W Almsley v. Ruſſel	
<i>Walham and Penburſt</i>	
<i>riſhes</i>	
Waites v. Briggs	473
Ward v. Evans	561
<i>Inter the Inhabitants of Ware and Stan-</i>	
<i>ſtead-Mount-Fitchet</i>	
	481
Warton v. Pitts	541
<i>Inter the Inhabitants of Watford and</i>	
<i>Wendover</i>	491
<i>Inter the Churchwardens of Watlington</i>	
<i>in Suffex and Starky</i>	
	541
Way v. Yalley	651
Weeks v. Peach	571
Wells v. Treguſan	461
<i>Inter the Parishes of Weſtbury and</i>	
<i>ſton</i>	531
<i>Inter the Inhabitants of Weſton-River</i>	
<i>and St. Peter's Marlborough</i>	
	491
White v. Bodynam	621
Wigmore's Cafe	431
Wildgoose v. Kellaway	631
Wilbraham v. Foley	591
Wilson v. Laws	581
Winter v. Lovedore	531
Withers v. Harris	601
Wits v. Polehampton	641
Wood v. Cleveland	511
Woodrington v. Deverill	<i>ibid.</i>
Woodward v. Cliff	571

Y

Y ORK (Archbiſhop) v. the Du-	
<i>of Newcaſtle</i>	
Young v. Ruddle	611

THE
General TITLES
IN THE
Second Volume.

L

AW Common, Canon, Civil, &c.	Page 411
Leafes	413
Legacy	415
<i>libellus Famosus</i>	417
imitations	420
London and the Customs thereof	425
Manatick, Ideot	427

M

<i>Madamus</i>	428
Marriages	437
Marthal and Marshalsea	438
Master and Servant	440
Merchants and Merchandize	443
Money	446
Monopoly	447
<i>Monfrans de Droit</i>	<i>ibid.</i>
Mortgages	449
Motion	450

N

Names of Purchase and Dignity	451
Novel Assignment	453

<i>Nisi Prius</i>	Page 454
Nonfuit	455
Notice	457
Nuances	458

O

Oaths and Affidavits	461
Obligation	462
Occupant and Occupancy	464
Offices and Officers	465
Office for the King	469
Orders of Justices of the Peace	470
Outlawry	494
Oyer and shewing of Deeds	497

P

Pardon General and Special	499
Palatine Counties of <i>Chester, Durham, &c.</i>	500
Parish, Town, Vill, &c.	501
Parliament	502
Parson, Vicar, and Curate	506
<i>Pauper</i>	<i>ibid.</i>
Payment and Satisfaction	507
Peers of the Realm	509
Perjury	513
Pleas and Pleadings	514
Pledge and Bailment	522
Poor,	

The General Titles, &c.

Poor, Poor's Rates, Vagrants, &c.

Page 523

Powers 537

Prescription 538

Presentation, Admission, Institution, Induction 539

Principal and Accessary 542

Privilege of Persons 543

Privilege of Place 546

Prohibition and Consultation 547

Proof 555

Property 556

Q

Quantum Meruit 557

Quare Impedit 559

Que Estate 562

R

Recognizances, Statutes, *Elegit*, Ex-
tent, &c. 563

Records 565

Common Recoveries 567

Recusants 572

Release and Defeasance 573

Remainder 576

Rents 578

Repleader 579

Replevin and *Homine Replegiando* 580

Request 585

Rescue 586

Restitution 587

Return of Writs 589

Reversion 591

Revocation 592

Riots, Routs, and Unlawful Assemblies 593

Rules of Courts 596

S

Scire Facias Page 58

Service and Suit

Sessions General and Quarter

Sheriffs

Statutes in General, and the Exposition thereof

Statutes of Hue and Cry

Subsidies, Taxes and Customs

Surrender

T

TAIL

Tender and Refusal, American

Term-Time and Computation

Traverse

Treason

Trespass

Trial

Trover

Tithes

U

Variance

Verdicts

View

Villeins and Villenage

Visne

Universities and Schools

Void and Voidable

Uses and Trusts

Usury and Extortion

W

Wager of Law
Warranty

Waifs, Estrays

Weights and Measures

Wills and Testaments

Witnesses

Words

Writs

Law Common, Canon, Civil, &c.

Blankard versus Galdy. Trin. 5 W. & M. B. R. Intr.
Pas. 3 W. & M. Rot. 35.

S. C. 4 Mod.
215, 222, 223,
&c.
See the Plead-
ings. Ibid.
Comb. 228.
Holt 341.

IN Debt on a Bond, the Defendant prayed Oyer of the Condition, and pleaded the Statute E. 6. against buying Offices concerning the Administration of Justice; and averred, That this Bond was given for the Purchase of the Office of Provost-Marshal in Jamaica, and that it concerned the Administration of Justice, and that Jamaica is Part of the Revenue and Possessions of the Crown of England: The Plaintiff replied, That Jamaica is an Island beyond the Seas, which was conquered from the Indians and Spaniards in Q. Elizabeth's Time, and the Inhabitants are governed by their own Laws, and not by the Laws of England: The Defendant rejoined, That before such conquest they were governed by their own Laws; but since that, the Laws of England: Shower argued for the Plaintiff, That a Judgment in Jamaica, no Writ of Error lies here, but only Appeal to the Council; and as they are not represented in our Parliament, so they are not bound by our Statutes, unless specially named. Vide And. 115. Pemberton contra argued, That by Conquest of a Nation, its Liberties, Rights and Properties are quite lost; that by Consequence their Laws are lost too, for Law is but the Rule and Guard of the other; those that conquer, cannot by their Victory lose their Laws, and become subject to others. Vide Vaugh. 405. That Error lies here upon a Judgment in Jamaica, which could not be if they were not under the Law. Et per Holt C. J. & Cur.

And, In Case of an uninhabited Country newly found out by English Subjects, all Laws in Force in England are in Force there; so it seemed to be agreed.

And, Jamaica being conquered, and not pleaded to be Parcel of the Kingdom of England, but Part of the Possessions and Revenue of the Crown of England, the Laws of England did not take Place there, until declared so by the Conqueror or his Successors. The Isle of Man and Ireland are Part of the Possessions of the Crown of England; yet retain their ancient Laws:

Vol. II.

B

That

(1.)
Where an uninhabited Country is found out and planted by English Subjects, all Laws in force here are immediately in force there; but in the Case of an inhabited Country conquered, not till declared so by the Conqueror. Vide 3 Keb. 401, &c.
2 And. 116,
4 Leon. 33.
7 Co. Calvin 23.
Vaugh. 279.
&c.
2 Vent. 4.
Post 666.
Comber.
228, 229.

Post 510.
5 Mod. 187.

That in Davis 36. it is not pretended, That the Custom of Tenantry was determined by the Conquest of Ireland, but by the new Settlement made there after the Conquest: That it was impossible the Laws of this Nation, by mere Conquest, without more should take Place in a conquered Country; because, for a Country there must want Officers, without which our Laws can have no Force: That if our Law did take Place, yet they in Jamaica having Power to make new Laws, our general Laws may be altered by theirs in Particulars; also they held, That in the Case of an Infidel Country, their Laws by Conquest do not interfere, but only such as are against the Law of God; and that in such Cases where the Laws are rejected or silent, the conquered Country shall be governed according to the Rule of natural Equity. Judgment pro Quer.

Vide post
672.

Matthew *versus* Burdett. Hill. 1 Ann. B. R.

(2.)
Canons oblige not the Laity without the Consent of the Civil legislative Power. Vide Hale's Hist. of the Law, pag. 28 to 33.

IN the primitive Church, the Laity were present at all Synods: When the Empire became Christian, no Canon was made without the Emperor's Consent: The Emperor's Consent included that of the People, he having in himself the whole legislative Power, which our Kings have not: Therefore, if King and Clergy make a Canon, it binds the Clergy in rebus clericis, but it does not bind Laymen; they are not represented in Convocation; their Consent is neither asked nor given.

12 Co. 72.
2 Inst. 57, 647, 653, 657. 2 Rol. Abr. 226, 454. Mo. 782. Br. Ordinary 1. 2 Cro. 670. 2 Bro. 38. Cro. Car. 588. Palm. 379. 3 Salk. 318. S. C. 2 Vent. 44. 2 Lev. 222. 2 Inst. 97.

LEASE

L E A S E S.

2 Show. 31.

Haths *versus* Ash. Trin. 8 Will. III. C. B.

A Lease to commence a datu, includes the Day of the Date. Adjudg'd by three Judges against Treby, C. J. (1.) Commence-
 But note, a die datu excludes the Day. Vide 5 Co. 1. ment a datu.
 94 b. 2 Co. 55. 2 Bulst. 83, 305. 3 Bulst. 203. Aleyn 77. Vid. post 625,
 Ray. 84. 627.
 Mod. 215. 6 Mod. 260. 3 Lev. 438. 5 Co. 21, 100. Cro. Jac. 258, 18, called Hatter ver.
 the Al. 77. 1 Rol. R. 8. 3. 1 Salk. 44.

Stomfil *versus* Hicks. Mich. 9 Will. III. C. B.

A Leases to B. for a Year, and from Year to Year as long as it shall please both Parties. Adjudg'd that this is a (2.) Lease for a Year, and so from Year to Year, quamdiu, &c.
 Lease for two Years, and afterwards at Will; and so it was ruled inter Bellasis and Burbrich. Hill. 8 W. 3. C. B. Vide post, pl. 6.
 l. 4. contra, and pl. 6. Holt 414. S. C.
A. possessed of a Term for 100 Years, grants the Land, Habendum for 40 Years, to commence after his Death. This is a (3.) Term for Years grants for a less Term, to commence after his Death. Good.
 good new Lease; and if H. possessed of a Term for 20 Years, grants the Tenements for nineteen Years, to commence after his Death, this will be good for so much of the twenty Years as shall be unexpired at the Time of his Death. Ruled by Holt C. J. 1 Sid. 359.
 at Lent. Assizes at Dorchester, 10 W. 3. Gree *versus* Studley. 1 Mod. 4.
 1 Lutw. 213, 214. Aleyn 4. Cro. El. 775.

If A. demise Lands to B. for a Year, and so from Year to Year, this is not a Lease for two Years, and afterwards at Will; but it is a Lease for every particular Year, and after the Year is begun, the Defendant cannot determine the Lease before the Year is ended. But in a Lease at Will, the Defendant may determine his Will after Payment of his Rent, at the End of a Quarter, but not the Beginning, lest the Lessor should lose his Rent. The Lessor cannot determine his Will in the Middle of a Quarter, without permitting the Tenant to have the Emblements. Ruled by Holt C. J. at Summer Assizes at Lincoln, 1699. (4.) Lease for a Year, and so from Year to Year, quamdiu, &c. what it is, and when it may be determined.
 Vide prox. p. When Lessor or Lessee at Will may determine his Will. Vide infra.

Leighton *versus* Theed. Hill. 13 Will. III. B. R.

IF H. holds Land at Will, rendering Rent quarterly, the Lessor may determine his Will when he pleases; but if he determines it within a Quarter, he shall lose the Rent which should have & prox. p.
 Vol. H. B 2

Vide Co.
Lit. 55. b.

have been paid for that Quarter in which he determines it. the Lessee may determine it when he pleases, but then he must pay the Quarter's Rent. Per Holt C. J.

Legg versus Strudwick. Hill. 7 Ann. B. R.

(6)
Parol Demise
to hold from
Year to Year,
& sic ultra
quamdiu,
&c. is a
Lease for
two Years,
and after eve-
ry subsequent
Year begun,
not deter-
minable till
that be ended.
See p. 413.
1 Mod. 4.
1 Lutw. 213,
214.
Rep. A. Q.
203. S. C.
Holt 417.
And not void
by the Sta-
tute of
Frauds.

IN Replevin the Defendant avowed, for that he being seised of the Locus in quo, demised the same to A. Habendum de anno in annum & sic ultra quamdiu ambabus partibus placere to commence from Lady-Day 1703, rendering an annual Rent payable quarterly. The Lessee entered, and died the 17th of December 1706. And the Rent for a Year and a Half ending Christmas before was arrear, for which the Lessor entered and distrained. To this the Plaintiff demurred. Et per Curiam was held first, That after the two Years, the Lessor or Lessee might determine; but if the Lessee held on, he was not then tenant at Will, but for a Year certain; for his holding on must be taken to be an Agreement to the original Contract, and in Execution of it; and the first Contract was from Year to Year. The third Year is not in the Nature of a distinct Interest, because it arises from the same executory Contract, and therefore the Lessor may distrain the third Year for the Rent of the second and such an executory Contract as this, is not void by the Statute of Frauds, tho' it be for more than three Years, because there is hereby no Term for above two Years ever subsisting the same Time; and there can be no Fraud to a Purchaser, the utmost Interest that can be to bind him, can be only one Year. And Holt C. J. cited this Case coram Hale C. J. A Composition was agreed upon between the Parson and his Parishioners for Tithes quamdiu ambabus partibus placuerit. If the Parishioner plows and sows, the Parson shall not that Year recede, and demand Tithes in Kind, but must make his Election at the Beginning of the next Year; for the Parishioner would not perhaps have sowed his Land, but that he relied upon his Contract. Cro El. 775. Keilw. 65. Aleyn 4. 2 Jon. 5. 1 Sid. 314 H. 8. 10.

LEGACY.

Vide post
464, 508, 547.Ewer *versus* Jones. Mich. 2 Ann. B. R.

It was held by Holt C. J. clearly, That a Devisee may maintain an Action at Common Law against a Certenant for a Legacy devised out of Land; for where a Statute, as the Statute of Wills, gives a Right, the Party by Consequence shall have an Action at Law to recover it.

(1.)
Action lies for a Legacy devised out of Land.
See 2 Show. 36, 37.
1 Chan. Cases 157, 258. 1 Chan. Rep. 134, 218, & prox. pag. Mod. Cases 20. 6 Mod 26. Holt 419. S. C.

Smell *contra* Dee. Mich. 6 Ann. In Canc.

I Bequeathed by his Will in these Words, viz. I give 100l. a-piece to the two Children of J. S. at the End of ten Years after my Decease: The Children died within the ten Years. per Cowper Lord Chancellor, This is a lapsed Legacy, and shall not go to the Executors of the Children; for the Diversity is where the Bequest is to take Effect at a future Time, and where Payment is to be made at a future Time. And tho' it was said by Sir Thomas Powys, That this differed from the Case where a Man devised 100l. to J. S. at his Age of twenty-one, because it is a Contingency whether he attain to that Age; but the Expiration of the ten Years is inevitable; yet the Lord Chancellor answered, That where-ever the Time is annexed to the Legacy itself, and not to the Payment of it, if the Legatee dies before the Time of Payment, it is a lapsed Legacy in that Case. de Dy. 59. b. 2 Vent. 342. Off. Ex. 347. Swinb. 311, 313. If a Legacy be devised generally, and no Time ascertained for Payment, and the Legatee be an Infant, he shall be paid interest from the Expiration of the first Year after the Testator's Death; but it seems a Year shall be allowed, for so long the Statute of Distribution allows before the Distribution be compellable, and so long the Executor shall have, that it may appear whether there be any Debts; but if the Legatee be of full age, he shall only have Interest from the Time of his Demand after the Year; for no Time of Payment being set, it is not payable, but upon Demand, and he shall not have Interest, but from the Time of his Demand; otherwise it is in Case of an Infant, because no Laches is imputed to him. But where a certain Legacy is left payable at a Day certain, it must be paid with Interest.

(2.)
Where a Time is annex'd to the Legacy, and not to the Payment, and Legatee dies before that Time, 'tis lapsed.
Hugh's Abr. 1 pt. 664. c. 14.
2 Vent. 346, 366.
2 Chan. Cases 155.
Skin. 148.
See 1 Chan. Cases 60, 196.
1 Chan. Rep. 183, 188.
2 Chan. Rep. 98.

Interest from that Day. Et nota; The Interest allowed is 5 per Cent. Per Cowper Lord Chancellor.

Hern *contra* Merick. Coram Harcourt Lord Chancellor. In Canc.

(3.)
Where real
Estate shall
be charged
with Legacies
in Equity.
Vid. ante 415.
1 Chan. Rep.
134, 288.
2 Chan. Rep.
200.
1 Chan. Caf.
57, 257, 258.

H. Seised in Fee, and indebted by Bonds, by Will gives Legacies to Childzen (whom he had otherwise provided for before) and devises his Land to his eldest Son in Tail. The eldest Son being also Executor, pays the Bonds with the personal Estate; and now the Legatees brought a Bill to come against the real Estate in the Place of the Bond-Creditors, and be paid out of the Land. The Court seemed to admit, That if the Land had descended, the Legatees might have been relieved in this Manner; but since the Testator had devised them, it was resolved, That they ought to be exempted; for it was as much the Testator's Intention that the Devisee should have this Land as the others should have the Legacies, and a specifick Legacy never broke into, in order to make good a pecuniary one. This Case is out of the Statute against fraudulent Devises, because the Debts are paid, and the Childzen being otherwise provided for, are not in the Nature of Creditors. Nota; This Case was upon an Appeal from the Decree of the Master of the Rolls, who held, That the real and personal Estate should be charged, that both the Debts and Legacies should be paid.

Skin. 158.

Libellus Famofus.

Dominus Rex *versus* Bear. Hill. 10 W. III. B. R.

INDICTMENT for Composing, Writing, Making and Collecting several Libels, in uno quorum continetur inter alia juxta tenorem & ad effectum sequent', and then sets out the Words. Upon Not guilty pleaded, the Jury found the Defendant guilty as to the Writing and the Collecting prout in indictment supponit' & quoad omnia alia præter scriptionem & collectionem Not guilty: An Exception was taken in Arrest of Judgment, That inter alia shewed there was something else which perhaps might, if it appeared, qualify the rest. Et per Cur. Non allocatur; For if that had been the Case, the Defendant could not have been found guilty; and regularly, where a Man speaks Treason, God save the King will not excuse him. Vide 2 Ro. Rep. 89. And it is not necessary to set forth all Libels; but if any Thing qualify that which is set forth, it may be given in Evidence.

Hard. 223. Yelv. 117. 1 Lev. 249. 1 Bulst. 151. 2 Brownl. 100. 1 Saund. 131.

Andly, It was agreed, ad effectum sequentem of itself had been enough; for the Court must be Judge of the Words themselves, and not of the Construction the Prosecutor puts upon them; but juxta tenorem sequent' imports the very Words themselves. Vide Ent. 116. Reg. 169. For the Tenor of a Thing is the Transcript: And Rokeby said, the Words ad effectum were loose and self Words; and the Words, juxta tenorem, being of a certain and more strict Signification, the Force of the latter was hurt by the former, for Utile per inutile non vitiatur; quod C. J. concessit; and the Case of Saltashe, H. 33 & 34 Car. 2. R. Rot. 1154. was remembred and agreed, and all were of Opinion, That the Words, ad effectum, were corrected by the Words, juxta tenorem.

Andly, It was held, That the finding guilty of bare Writing and Collecting was criminal, not but that Collecting had been better out of the Case; for, per Holt C. J. Bare Copying out of a Libel, by one that is neither Conceiver nor Composer, is highly criminal; as to this the Chief Justice said, the Essence of a Libel consists not in the infamous Matter, for if a Man speaks such Words, unless the Words be put in Writing, he is not guilty of a Libel; but the Nature of a Libel consists in putting this infamous

See 4 Co. 14.
19.
5 Co. 125, &c.
9 Co. 53, 59.
3 Inst. 174.
Mo 813, 627.
1 Sid. 242.
2 Show. 468,
471, 488.
Post 646. S. C.
Ante 324.
3 Salk. 226.
Cases B. R.
218.
Holt 422.
Carth. 407.

The whole Libel need not be set forth in Indictment, but if any Part qualifies the rest, it may be given in Evidence.
See 5 Mod. 163, 164, &c.
1 Sid. 270, 271.
5 Co. 125.
1 Mod. 58.
Hard. 470.
Faresly 91.
1 Danv. 156.
1 Vent. 25
2 Sid. 163.
4 Co. 14. b.
2 Saund. 369.

Mod. Cases
102, 103.
Post 660.

Copying a Libel is criminal.
5 Mod. 165.

Essence of a Libel consists in the Writing.

mous Matter into Writing; and therefore if Bear writt Matter, he is a Libeller; for it was not a Libel till it was written; and in all Cases where a Man does that Act, which makes a Thing to be what it is, he is and must be construed to be the Doer of that Thing. This is seen in all Offences, from the highest to the lowest.

If H. contrives any treasonable Matter, and another writes down the Contrivance, the Writer is as guilty as the Inventor. Where an Act of Parliament makes Sodomy Felony, and says nothing of the Abettors, if B. should stand by and hold the Door while A. committed Sodomy, B. would be as guilty of Sodomy as A. So in 3 Inst. 59. where an Act of Parliament makes any Thing Felony, tho' nothing be said of the Accessories in the Statute: So in the lowest Offences, where there are no Accessories, but all are Principals, as if H. should hold A. while B. beats him, he is guilty of the Battery.

So in the principal Case, he that does that without which a Thing could not be what it is, viz. a Libel, cannot be construed to be innocent.

He that writes a Libel is the Contriver.
3 Mod. 68.

Having a written Copy of a known Libel, is Evidence of a Publication.
See 5 Mod. 165.
3 Mod. 68.

Where a Matter is unlawful in general, a general Allegation shall be so taken.

It is objected, That it is held in 9 Co. 59. Lamb's Case, That a Libeller must be either the Contriver, Procurer, or the Publisher. But this ought to be expounded by Moor 813. where the Writer is held to be in Law a Contriver; and then that Opinion of my Lord Coke's may be admitted to be Law; otherwise it would be doubtful; for if that Case be looked into, the Question then was about the Publication of a Libel; and it was held, That writing the Copy of a Libel was not a Publication, but only Evidence of a Publication; but there was no Question made how far he was guilty of Libelling; and for the Matter of Publication, the bare having a Libel is not a Publication. If a Libel be publickly known, having a written Copy of it, is an Evidence of a Publication; but otherwise where it is not known to be published.

It is objected, That writing a Libel may be a lawful Act, by the Clerk that draws the Indisment, or by a Student that takes Notes of it; and so the Defendant's might be a lawful Writing.

To this the Chief Justice answered, That the Matter abstractedly considered is unlawful, therefore the general Finding shall be taken to be criminal; and that if the Writing was innocent, in the Case objected, there ought to be a special Finding of the Particulars, which distinguish and excuse it. If an Action be brought on the Statute of Maintenance, 'tis sufficient to say, quod manutenuit; yet in some Circumstances a Man may lawfully maintain a Suit, as an Attorney or a near Relation; yet because it is unlawful in Abstracto, that general Allegation is enough, and shall be understood of an unlawful Maintenance and farther, It cannot be understood of such a Writing; for if

Officer or Student does it, 'tis no Libel because it is not done
and infamiam of the Party, but to bring the Offender to Punish-
ment, and it is only tenor Libelli, and upon fuch Evidence the
Defendant could not be found guilty. The Cafe in 3 Inft. 174.
is a ftrong Cafe: In that Cafe J. de Northampton is charged
with writing only, and there is no Mention made of a Publication.
I am not under any Necessity of giving my Opinion, whether
writing a Copy of a Libel be writing of a Libel: for if it be not,
then the Jury having found the Defendant guilty of writing a
Libel, he must be taken to be guilty of writing the Original, and
a Copy could not be given in Evidence. On the other Side, if
the Copy of a Libel be a Libel, then the writing of it is a great
Offence: But that People may not go away with a Notion,
that writing of a Copy, tho' by one that has no warrantable
Authority, is not Libelling, the Chief Justice said, That fuch
Copy contained all Things necessary to the Constitution of a
Libel, viz. The scandalous Matter, and the Writing; and it
has the same pernicious Consequence; for it perpetuates the De-
stroy of the Thing, and some Time or other comes to be pub-
lished; therefore he held, That Writing a Copy of a Libel was
writing a Libel; and if the Law were otherwise, Men might
write Copies and print them with Impunity.

Writing a
Copy of a
Libel with-
out Authori-
ty, is writing
a Libel.
5 Mod. 164,
165.
Pop. 139.
12 Rep.
Dr. Wootton's
Case.

3 Inft. 134. 1 Vent. 31.

Farther, the Chief Justice said, That the Defendant had great
labour in the Verdict, for when a Libel appears under a Man's
own hand-writing, and no other Author is known, he is taken
in the Manner, and it turns the Proof upon him; and if he can-
not produce the Composer, it is hard to find that he is not the
very Man. A Man could have no Temptations to write fuch
Libels, but Rancour againft the Government.

Lastly, It was objected, That the Defendant being found
guilty of Collecting and Writing, and not of Making and Com-
posing, the Verdict is repugnant, or an Acquittal; fed non allo-
cur; for making is the Genus, and composing and Contri-
ving is one Species; Writing a second Species, and Pro-
ving to be written a third Species; so that not finding him
guilty of all, but writing only, is finding him Not guilty of any
species of Making, but Writing. Justin. Inft. lib. 4. cap. 4.
l. 1. de injuriis, and Braet. lib. 3. Fitz. Clt. Coron. 135. Bare
writing was punishable in the Star-Chamber. Hob. 62, 215.
Co. 35. Hell. 4. Moor 421. Dy. 372. Judgment pro Rege.

Cro. Carr.
125

Far. 49.
See 1 Saund.

37.
2 Saund. 66,
120, 125.
1 Sid. 305.
Hutt. 109.
Cro. Car. 163,
513, 535.
3 Mod. 426.
2 Mod. 71,
&c.

Vid. 1 Lev.
149, 143.
S. C. Carth.
136.
1 Show. 98.

(1.)
Defendant's
being beyond
Sea does not
avoid the Sta-
tute of Limi-
tations.
Comber. 190.
2 Mod. 311.
Note; the
Law is now
alter'd by Stat. 4, 5 Ann. c. 16. 1 Sid. 465. 2 Vent. 256. 3 Lev 21, 283, 367. 6 Mod. 24
Show. 99. Jon. 253.

LIMITATIONS.

Hall versus Wybourn. Trin. 1 W. & M. Rot. 130. B. R.

IN Bar of the Statute of Limitations, the Plaintiff replied, that the Defendant was beyond Sea, and it was held no Plea, for the Plaintiff might either file his Original, or outlaw him; and in one Bynion's Case, it was held by Bridgman C. J. That tho' the Courts of Justice were shut up so as no Original could be filed, yet this Statute would bar the Action; because the Statute is general, and must work upon all Cases which are not exempted by the Exception.

Budd versus Berkenhead. Trin. 2 W. & M. B. R.

(2.)
In Replica-
tion to avoid
the Statute of
Limitations,
the Continu-
ances must
be shewn.
See 2 Show.
79.
3 Mod. 111,
112.

DEFENDANT having pleaded the Statute of Limitations, the Plaintiff replied in Avoidance, That he sued on an Attachment returnable Mich. 34 Car. 2. Et quod superius taliter processum fuit, that the Defendant in Michaelmas Term 2 Jac. 2. appeared, &c. Et per Cur'; This pleading is not good, it must be shewn that there were Continuances till the Time declaring, and a Taliter processum is not sufficient to shew a Matter before Declaration, tho' it has been held so for Matters after

Coventry ver. Apsley. Mich. 3 W. & M. Rot. 411. B. R.

(3.)
Imprison-
ment, Statute
of Limitati-
ons pleaded
in part. Plain-
tiff ought to
reply, it was
one conti-
nued Dures.
Vide post pl.
11.
Comber. 26.
Salk. 638.

TRESPASS for imprisoning him, and detaining him in Prison from 32 Car. 2. till the 3d of April. 4 Jac. 2. The Defendant pleaded as to all, till 34 Car. 2. such a Day, Non cul. fra quatuor Annos; and as to the rest, a Pleint and a Capias issued. The Plaintiff demurred: Et per Cur. Tho' the Imprisonment be complained of as one continued Imprisonment, yet the Defendant may divide the Time, and plead the Statute as Part, and the Plaintiff may reply the Continuance; therefore to this, Judgment was given against the Plaintiff upon his Demurrer, but for him as to the rest; because the Capias was awarded by the Court ex Officio, and it did not appear that the Defendant meddled in it.

Curry & Ux' versus Stephenson. Pas. 6 W. & M. B. R.
Intr. Hill. 5 W. & M. Rot. 37.

Comber.
311. S. C.
call'd Curry
& Ux. ver.
Stephens.
Skin. 555.

HAS indebted to A. who died, B. received the Money, and afterwards the Plaintiff's Wife took out Letters of Administration to A. and within six Years after the Letters of Administration, but not within six Years after the Receipt of the Money, brought an Indebitatus Assumpsit against B. as for Money received to the use of him and his Wife; the Defendant pleaded Non Assumpsit infra sex Annos; the Plaintiff replied Special Matter; and upon Demurrer, the Court were of Opinion, That the Statute could be no Bar, because the Plaintiff's Title commenced by taking out Letters of Administration, and this was not a Cause of Action in the Intestate; but they thought it hard to make this so much Money received to the Plaintiff's Use, when at the Time of this Receipt, he was not Administrator. Note: There was a faulty Replication, and the Court advised the Plaintiff to bring a new Action, and so the Matter went off.

(4.)
A. receiv'd
the Intestate's
Money, and
afterwards
Administra-
tion was
granted to B.
The Cause of
Action ac-
crued by the
Administra-
tion.
See 1 Chan.
Cases 152.
2 Chan. Caf.
217. & post
Pl. 9.
4 Mod. 376.
Carth. 335.
S. C. 2 Saund.
150. call'd
Curry ver.
Goulf. 171.

Stephenson. 2 Cro. 60, 61. Holt 98. Goulf. 171.

Stokes versus Berry. At the Summer-Assises at Lincoln, 1699. Coram Holt C. 7.

IF A. has had Possession of Lands for twenty Years without Interruption, and then B. gets Possession, upon which A. is ejected to his Ejectment, tho' A. is Plaintiff, yet the Possession of twenty Years shall be a good Title in him, as if he had still been in Possession. Ruled per Holt C. J. The same Point was held by Holt C. J. at Lent-Assises for Bucks, 12 W. 3. because Possession for twenty Years is like a Discent, which tolls Entry, and gives a Right of Possession, which is sufficient to maintain an Ejectment.

(5.)
Twenty
Years Posses-
sion is a good
Title in
Ejectment
for the Plain-
tiff, as well
as Defendant.
Holt 264. S. C.
1 Mod. Caf.
287.
Post. 685.

Green versus Rivett. Pas. 1 Ann. B. R. Intr. Mich.
13 W. III. Rot. 316.

S. C. Far. 12.
vide ibid. 5.

INDEBITATUS ASSUMPSIT laid several Ways; the Defendant pleaded Actio non, quia dicit quod billa prædict. non fuit 20 die Junii & non antea, & quod ipse ad aliquod tempus infra sex Annos ante exhibitionem billæ prædict. Non assumpsit. &c. The plaintiff replied a Bill of Middlesex, tested die prox' post tres septimanas, &c. returnable the same Day, whereupon was returned Non est inventus, and continued down Vic. non misit breve & præcept. sicut alias; to this it was demurred.

(6.)
Plea of the
Statute of Li-
mitations to
be favoured.
Vide 1 Mod.
31, 89, 268.
2 Mod. 71,
311.
1 Vent. 90.
2 Saund. 125,
127.
1 Saund. 36.
red, 37, 120, 127.

2 Saund. 120, red, and Judgment given for the Defendant; for there cannot be such a Bill of Middlesex as this, which is returnable the very Day of the Terme, and the Statute of Limitations, on which the Security of all Men depends, is to be favoured.
 121, 125, 162.
 2 Mod. 72.
 Comberb. 70.
 1 Show. 354.
 2 Show. 79.
 126.
 3 Salk. 227.

Hunt *versus* Burn. Hill. 1 Ann. B. R.

S. C. 1 Salk. 339. Vide the State of this Case, Tit. Fines, pl. 5. Vol. 1. p. 339.

(7.) 1st, **U**PON the Question in this Case, Whether it appeared by the Verdict, that the Issue in Case was barred of his Formedon by 21 Jac. 1. the Court held, That the Verdict was insufficient; and that it should have found that no Formedon was brought, else the Court could not intend but that it was brought for this is Matter of Bar, which should come on the Defendant Part to shew; and this Act is not penn'd as the Statute of finibus: It is enough in that Case to find a Fine, and you need not find that the Party claimed or entered not, for that comes in by way of Proviso; but here it is Part of the Body of the Act.
 2dly, They held, That supposing him barred of his Formedon yet he is not thereby hindered to pursue his Right of Entry which accrued to him by the Death of Tenant for Life; for this is a new Right which he had not before: That where a Man releases his Right, he cannot pursue his Action or Remedy; but a Man has a Right and several Remedies, the Discharge of one is not a Discharge of the other, and that the Statute of 4 H. enures and operates by Way of Bar to the Right, which answers Saul and Clerk's Case, Jones 210, 211. But the 21 H. and the 21 Jac. 1. operate by Way of Bar to the Remedy, and the Word Right there is Right of Entry.

(8.) Heyling *versus* Hoskins. Vide this Case, Title Action sur le Case sur Assumpsit, pl. 19. Vol. 1. p. 29.

Gould *versus* Johnson. Hill. 1 Ann. B. R.

(9.) **A**SSUMPSIT, That in Consideration that the Plaintiff, the Defendant's Request, would receive A. and B. into his House, ut Hospites, and diet them, the Defendant promised, &c. Non Assumpsit infra sex Annos was pleaded; the Plaintiff demurred and held no Plea; for the Defendant cannot in such Case plead, Quod Non Assumpsit infra sex Annos, but Actio non accrevit infra sex Annos; for 'tis not material when the Promise was made, the Cause of Action be within the six Years; and the Diet might be long afterwards; and tho' it appears upon the Face of the Declaration, that the Cause of Action did not arise within six Years.
 Where the Duty arises on Consideration executory, the Defendant must plead, Quod actio non accrevit, &c. Vi. antepl. 4.
 2 Show. 79, 126.
 1 Mod. 71, 268.
 2 Saund. 66, 125. 1 Saund. 36, 37. 1 Vent. 89. 2 Keb. 674. 1 Lev. 298. S. C. Ante 25. Far. 143. Holt

Pears; yet the Defendant shall not take Advantage of that, with-
out pleading; because there might be an Original sued out, which
the Plaintiff cannot otherwise shew, than by Way of Replication,
upon the Defendant's putting him upon it.

1 Lev. 287, 298. 2 Mod. 312. 1 Vent. 89. 1 Sid. 465.

Sec. 1. Mod.
71, 89, 268,
269.
2 Mod. 311.
1 Lev. 48, 111.
2 Saund. 127.

Reading *versus* Royston. Hill. 1 Ann. B. R.

See Farel. 5.
& 12.

ONE seised in Fee, having Issue two Daughters, devised
his Land to his Grandson by his eldest Daughter in Fee; The
eldest Daughter being dead at the Time of the Devise: The
Grandson died without Issue, and the Heir of the Grandson being
the Heir on the Part of the Father, and the Heir of the other Co-
parcener, entered into the Land, and took the Profit by Moieties
for twenty Pears together, thinking according to the Opinion of
Sir Matthew Hale in his younger Pears, (who was their Coun-
sel) that the Devise was void for one Moiety. Now the Mistake
being discovered, the Heir of the Grandson brought an Ejectment
against the Heir of the other Coparcener; and upon a Special
Verdict found, it was objected in his Behalf, That the Devise
was void as to one Moiety; but this being over-ruled, (quod
vide Title Discent, pl. 3. Vol. 1. p. 242.) it was then objected,
That the bringing of this Ejectment against the Heir of the other
Coparcener, for this Moiety, admitted the Plaintiff to be out of
Possession for twenty Pears, and then he was barred by the Sta-
tute of Limitations. Sed per Cur.

(10.)
Statute of
Limitations
runs not
against Heirs
unless actual-
ly ousted or
disseised.
S. C. Ante
242.
Pre. Ch. 222.

Co. Lit.
163. b.
1 Co. 93.
94. b.
Co. Lit. 347. b.
1 And. 69.
Owen 65.

The Statute of Limitations never runs against a Man, but
where he is actually ousted or disseised; and true it is, one Tenant
in Common may disseise another; but then it must be done by actual
Disseisin, and not by bare Perception of Profits only; but here
the Difficulty is not so great; there is no Tenancy in Common in
his Case, for the Heir of the Grandson had the whole by Devise,
and the other is a meer Stranger; and where two Men are in
Possession, the Law will adjudge it in him that hath the Right.
A Man may be Tenant in Common by Prescription, yet he may
not be Tenant in Common by Wrong; nor can a Man be dis-
seised of an undivided Moiety; therefore the bringing the Ejectment
imports nothing; for if a Man be seised of the whole, and makes
Lease to another of a Moiety undivided, and a Stranger ousts
the Lessee, he must bring his Ejectment of a Moiety, and so if
they be both ousted, they must bring several Ejectments.

Ante 392.
Co. Lit. 199.

Tenants in
Common
may be by
Prescription,
not by
Wrong.
2 Saund. 116.
1 Inst. 195.
196, 197, 198.
2 Lev. 27.
Show. 542.

Cannot join in Ejectment. 1 Lev. 109. 5 Mod. 25, 26, 27.

Blackmore *versus* Tidderly. Hill. 3. Ann. B. R.

S. C. 6 Mod.
240.
Rep. A. Q. 38.

A Trespass for Assault and Battery, the Defendant pleaded
Non culp. infra sex Annos, by Mistake, and not according to
the

(11.)
Not guilty
within six
Years, is ill
in Tre'p'as.
Vide ante
Pl. 3.

6 Mod. 5,
12, 99.
Farell. 99.

the Statute, which is but four Years: The Plaintiff demurred and after Argument it was adjudged an ill Plea; for if it be considered as at Common Law, there was no such Plea; if on the Statute, the Act is not pursued, and the Plaintiff could not take Issue on it; for quod est culp. infra sex annos, is an Issue immaterial; because it may be, the Jury might find him guilty infra quatuor Annos, but guilty infra sex Annos. Judgment for the Plaintiff.

(12.)
Statute of
Limitations
pleadable to
a Suit in the
Admiralty
for Mariners
Wages.

Quere.
Suits for Ma-
riners Wages.

Vide St. 4 &
5 Annæ, c. 16.

1 Salk. 31.
to 35.

6 Mod. 11,
12, 25, 79.
Post 548.

Mod. Cases
424.

S. C. 3 Salk.
227.

Holt 428.
Rep. A. Q.
43.

1 Chan. Cases
152.

2 Chan. Cases
217.

2 Saund.
124, 126.

3 Mod. 244.
1 Lev. 298.

4 Mod. 105. 1 Sid. 465. 1 Vent. 146, 343. Raym. 3. Winch 8. 6 Mod. 124 & 5 Ann. cap. 16.

Hide *versus* Partridge.

LIBEL was for Mariners Wages in the Admiralty Court and the Defendant there pleaded the Statute of Limitations viz. That no Cause of Action accrued within six Years pro ante tempus mentionat. in Libello; and it was over-ruled there. And now upon a Motion for a Prohibition it was urged, That Mariners Wages were suable in the Admiralty by Indulgence only, and not of Right; That at Common Law, the Statute would be a good Plea: On the other Side 'twas said, the Statute extended only to Courts at Common Law; that it was not pleadable to a Proceeding in the Spiritual Court pro violenta manu injectione super Clericum: But a Prohibition was denied, because the Statute was ill pleaded; but the Plea was afterwards amended: And Holt C. J. said, It was strange that the same Matter, well pleaded, should be a Defence in one Court, and not in another. The Statute of Limitations is a good Plea in Chancery; it is true, 'tis no Plea to a Suit pro violenta manu, &c. but that is, because the Proceeding is pro reformatione morum, and not for Damages; and so 'tis at Common Law, 'tis no Plea to an Indisment for Trespass, otherwise in Action. Adjournat'.

Matthews *versus* Phillips, cite and agree Mich. 6 Ann. B.

(13.)
Action re-
mov'd by
Habeas Corpus,
Statute of
Limitations
pleaded a-
bove, Plain-
tiff may re-
ply, the Suit
below was
within six
Years.

See 2 Show.
79, 126.
1 Sid. 228.

DEBT was brought in the Palace Court, and after some Proceedings there, the six Years expired; the Defendant sued a Habeas Corpus, and removed the Cause into B. R. where the Plaintiff declared de novo, and the Defendant pleaded That the Cause of Action did not accrue within six Years before the Teste of the Habeas Corpus; and this was held to be a good Plea, but that the Plaintiff might reply the Suit below, and shew that to have been within the six Years; not that this Suit was a Continuance of the Suit below, but that the Plaintiff had rightfully and legally pursued his Right; and it should not be in the Power of the Defendant to defeat or hinder him of a

dy, without any Default; as where one brings an Action before the Expiration of six Years, and dies before Judgment, the six Years being then expired, this shall not prevent his Executor.

See 5 Mod. 426.
1 Mod. 89.
2 Lev. 166.
Lutw. 258,
263, 265.

LONDON, and the Customs thereof.

See 3 Lev. 264.
1 Roll. R. 365.
Moor 576.
5 Mod. 75, 93.
160, 440.
6 Mod. 69,
123, 244,
177.
Hard 56, 210.
Cart. 68,
114, &c.
S.C. 1 Salk. 76.
V. Post. 498.

Arnot *versus* Brown. Mich. 7 W. III. B. R.

ARNOT and BROWN were Owners of two contiguous Houses. Brown had Lights in his House towards Arnot's Yard, and Arnot made up Blinds. The Court of Aldermen, upon 19 Car. 2. c. 3. ordered they should be abated; but a Prohibition was granted in B. R. For whatever they may do in their Inner Court by Quod permittat, where they have Power to determine real Actions; 'tis plain that the Court of Aldermen have no Power in this summary Way, unless by 19 Car. 2. c. 3. and that gave them only a temporary Power during the Rebuilding of the City. While the City was rebuilding they had Power to assign Lights; but by being once denied, the Party gained a legal Title to them, and may maintain an Action at Common Law for the Obstruction, and the Court of Aldermen have no farther Power. Vide Residuum 6 Mod. 244.

(1.)
Court of Aldermen's Power concerning new Lights, by 19 Car. 2. c. 3. was only during the Rebuilding of the City.
Stopping Lights, see 1 Sid. 167.
Poph. 170.
9 Co. 38.
Hob. 131.
Hurt. 136.
1 Lev. 239,
248.

87. 1 Mod. 55. 2 Lev. 193. 1 Vent. 274. 6 Mod. 166, 193, 314, 382, 386. 1 Lutw. 382, 386.

mina Regina *versus* Rogers. Trin. 1 Ann. B. R.

UPON a Certiorari the Custom of London was returned, viz. That if any Citizen speaks contemptuous Words of an Alderman, or assaults him in the Execution of his Office, an Information shall be exhibited against him in the Name of the Common Serjeant in the Court of Aldermen, and that they should proceed against him to fine him; and that at a Wardmote by Sir Robert Jeffreys, the Defendant assaulted him, and said, we as much to do here as you; you think sure you are taking your Bridewel Birds, but you are mistaken; for which an

S.C. Farist 28.
See 1 Mod. 35.
& prox. Pag.
5 Mod. 75.
94, 440.
2 Lev. 200.
6 Mod. 124.
Holr. 331.

(2.)
Custom to punish by Information in the Court of Aldermen, for Assault and contemptuous Words of an

In-

Alderman in Execution of his Office, is good. Otherwise, if to disfranchise.

Post 697. Information was exhibited by the Common Serjeant. Et per Cur.
 3 Cro. 78. It had been doubtful if the Offence had been by Words only, be-
 1 Vent. 16. cause no Indictment lay at Common Law, but he is to be bound
 1 Sid. 65. to Good Behaviour; yet for Assault he is punishable, and that
 1 Mod. 35. may be by Information there by the Custom, as well as in B. R.
 3 Mod. 139. by the Course of the Court, tho' the regular Course at Common
 133. Law is by Indictment. 2dly, The Court held, That the Informa-
 Farell. 28. tion lay in the Court of Aldermen, tho' an Alderman was grieved
 6 Mod. 124. otherwise of the Mayor, for he is an integral Part, without which
 4 Mod. 341, 2. the Court cannot be held, but the other may be severed, and he
 1 Vent. 302. must not sit; so the Mayor and Aldermen may grant to an Alder-
 327. man, but the Aldermen and City cannot grant to the Mayor: But
 3 Keb. 764. the Court held, That a Custom to disfranchise for contemptuous
 714, 799, 811. Words spoken of an Alderman, was void, according to 2 Lev. 200.
 2 Keb. 594.
 2 Lev. 200.
 1 Ven. 16,
 327.
 2 Jo. 229.
 2 Cro. 58.
 Hob. 62. 8 Co. 116. 3 Cro. 73. Sheph. Abr. 436. Lev. 398. Corporations 13, 24.

Custom of LONDON concerning Orphans and Freemens Estates

Seci Cro 347. If a Freeman of London has no Wife, but has Children, the
 1 Lev. 227. half of his personal Estate belongs to his Children, and the
 Raym. 4, 116. other half the Freeman may dispose of; so if the Freeman has
 1 Keb. 868, Wife and no Children, half of his personal Estate belongs to his
 2 Lev. 32, 130. Wife, and the other half he may dispose of: But if a Freeman
 1 Mod. 77, hath a Wife and Children, one third Part belongs to the Wife
 78, &c. and another third Part to the Children, and the Freeman may
 2 Show. 174, dispose of the other third Part. And if such Freeman dies In-
 409, 467. testate, the Custom affects only two thirds, and the remaining
 2 Chan. Cases 170, 161. third is subject to the Statute of Distributions, and so dividing
 1 Chan. Cases 199, 285, 310. the whole into Ninths, four Ninths belong to the Wife, and five
 Ven. 134. Ninths belong to the Children.
 con. 465.
 Skin. 26, 41.

Custom ex- If a Freeman of London has two Sons, and the eldest Son dies
 tends only to leaving a Son, and then the Freeman dies, the Granchild, tho'
 Children, not in Law a Representative of the Son, who never was advanced
 Granchil- has no Part by the Custom; for the Custom of London extends
 dre only to the Children, and not to the Granchildren; per North
 and so it has been certified by the Recorder into Chancery.

Hotchpot ex- If a Freeman of London has but one Child, and he has re-
 tends only ceived some Portion from his Father, and the Father dies, leav-
 amongst ing this Child and a Wife, the Child shall have his full Orphan
 Children. Part, without any Regard to what he has already received; so
 Vern. 397. that Advancement in Part is only to be brought into Hotchpot
 with Children, and not with others. Per Sir Edward North

Where it ap- If a Freeman of London has advanced any of his Child
 pears under with a Portion; yet if it appears what that Portion was by a
 the Father's Writing under the Father's Hand, or by the Father's Will, or by
 Hand, how Marriage-Settlement, and by the said Will or Settlement it
 much a Child said, That the said Portion is or was in full of his Child's Portion
 has received, by the Custom; yet this Child shall come in for the custom-
 the Court will judge
 whether full
 Advance-
 ment, or not.
 Vern. 89, 216. Vide Act of Parliament 11 Geo. 1. by which Power is given to Freemen to dispose
 personal Estates by Will.

Part of the rest of the Father's personal Estate, bringing the Portion already received into Potchpot; otherwise it is, if it does not appear under the Father's Hand what the Advancement was.

Lunatick, Ideot.

Vide 4 Co.
124, &c.
6 Co. 69.
8 Co. 170.
9 Co. 31.

Hard's Case. Mich. 8 Will. III. B. R.

SIR Bartholomew Shower moved to quash an Order of Ju-
stices, for removing an Ideot to the Place of the last le-
gal Settlement of his Father, comparing it to the Case of
a Bastard, who is to be maintained by the Parish where
is born. Sed per Holt C. J. The Father of an Ideot ought
to maintain him, and if he cannot, the Parish or Place where
his Father is settled. There is no Difference between an Ideot
and any other poor Child. The Case of a Bastard differs, for
the Reason of that is, because he has no Father, or rather
one that the Law looks upon as such; and therefore till 18 Eliz.
the Parishes where they were born, were bound to maintain
them. Adjournat'.

(1.)
Maintainable
by the Parish
where the
Father is
settled, not
where born.
V. post 528.
485. pl. 43.
Comberb.
380, 381.
Mod. Cases
87.

Thompson *versus* Leach. Hill. 9 Will. III. B. R. S.C. post 463,
476, 679

Tenant for Life, being Non Compos, with Remainder to
his first Son in Tail, Remainder to B. in Fee, surrendered
Deed of Surrender to B. before he had a Son; this Deed of
Surrender was held absolutely void, and the contingent Remain-
der not destroyed.

(2.)
His Deed is
void.
Vide Lurw.
1188.
S. C. Eq. Ab.
178. p. 3.

164 p. 13. 3 Salk. 300. 1 Show. 296. Cases B. R. 175. 3 Mod. 296, 301. 3 Lev. 284.
in Parl. 150. 2 Vent. 198. Comb. 438, 468. Carth. 211, 250, 435. Holt 357, 623, 665.

M A N D A M U S.

Vide 1 Lev.

23, 65, 75, 91,

119, 123,

148, 187, 162.

2 Lev. 14, 18, 238. 3 Lev. 309. 1 Mod. 82. 3 Mod. 265, 332, &c. 4 Mod. 233, 234, 260, 280, 368.

See pag 430.
pl. 8.

Anonymus. Mich. 8 Will. III. B. R.

(1.)
No peremp-
tory Manda-
mus upon an
Action for a
false Return
brought in
C. B.
S. C. 5 Mod.
316.
Comb. 400,
419.
Holt 438.

IN an Action on the Case in the Common Pleas, for a false Return of a Mandamus, Judgment was given for the Plaintiff upon Demurrer; and now Serjeant Pemberton came in B. R. and pray'd a peremptory Mandamus; but it was denied; for per Holt C. J. Every Mandamus recites the fact prout constat nobis per recordum. How can we say that in the Case, we cannot take Notice of the Records of the Common Pleas? You might have brought your Action here.

Dominus Rex *versus* The Mayor and Burgesses of Wilton. Mich. 8 Will. III. B. R.

(2.)
Want of
Summons is
no Objection
if the Person
appeared and
was heard.
Vide post
435.
S. C. 5 Mod.
255, 257.

A Mandamus issued to restore Elias Chalk to the Place of Burgess of Wilton, to which was returned a Custom of the Mayor and Burgesses to remove for Misbehaviour: That they set forth several Instances of Misbehaviour, and that being thereupon fully heard to all that was objected in the Common Council of the Mayor and Burgesses, and it being found prov'd upon him, they turned him out. It was objected, That it was not said he was summoned. Vide Style 51, 446, 483 Bulst. 189. 2 Keb. 489. Per Cur'. The End of the Summons is, that he may be heard for himself, and therefore where he has been heard, want of Summons is no Objection; but this was afterwards determined on other Objections.

Vide 4 Mod. Dominus Rex *versus* The Mayor, &c. of Oxon. Mich. 8 Will. III. B. R.

(3.)
Where an Of-
ficer at Will
is removed,
and the Cor-
poration does
not rely up-
on their
Power, but
return a Mis-
demeanour, and that is insufficient, peremptory Mandamus shall issue.

A Mandamus issued to the Mayor and Commonalty of Oxford to restore Slatford to the Office of Town-Clerk; they returned their Charter of Incorporation, which gives them Power to chuse a discreet Person to be Town-Clerk, to hold at the Will of the Mayor and Aldermen; The 13 Car. 2. Stat. 2. and the Statute of W. & M. about taking the Oaths, and that the Office of Town-Clerk

Clerk being void, they chose Slatford, and that he took the Oaths of Office coram nobis Majore & Ballivis; but did not coram nobis Majore & Ballivis take the Oath of Allegiance, per quod his Office became void, & ea ratione, &c. Upon which these three Points were stirred and settled.

1st, Whether the Party that comes in is to take the Oaths at his Peril, or they are to tender them, and if he refused, whether it must not appear upon the Return? Et per Cur. He must take them at his Peril; the Magistrate need not tender to him, but he must tender himself to the Magistrate, and demand them; and if it be refused, must sue a Mandamus, and the Magistrate is punishable; if the Law were otherwise, it would be in the Power of the Magistrate to elude the Act in Favour of the Party.

1 Vent. 82.
Vide Raym. 212.
2 Saund. 289.
2 Show. 68, 475.
4 Mod. 233, 237, 239.
5 Mod. 432, 433, &c.
3 Mod. 72, 118.
Post 432.

2dly, Whether it be enough to say, he did not take the Oaths before them? And this was held naught; for two Justices have a Power to administer the Oath, and he might take the Oath before them.

3dly, Whether a Person that was only Tenant at Will, should have a peremptory Mandamus? Et per Cur. We do not determine whether there ought to be a good Cause, or not, for such Removal; but suppose it may be without Cause, yet still they must determine their Will: Now they do not return a Determination of his Office by their Will, as the Reason why they do not admit him, but the special Matter of his not taking the Oaths; therefore, since his Office continues, and this Excuse is insufficient, he ought to be restored. A peremptory Mandamus was granted. Vide Serjeant Whitacre's Case.

The Mayor of Coventry's Case. Hill. 9 Will. III. B. R.

A Motion was made for an Attachment, for not returning an Alias Mandamus. Et per Holt C. J. In Case of a Mandamus out of Chancery, no Attachment lies till the Pluries, for that is in the Nature of an Action to recover Damages for the Delay; but upon a Mandamus out of this Court, the first Writ ought to be returned; yet an Attachment is never granted without a peremptory Rule to return the Writ, and then an Attachment goes for the Contempt; and in this Case a peremptory Rule was made.

(4)
The first Writ ought to be returned.
ed. Mod. Cases 25.
Post 434.

Dominus Rex *versus* The Mayor, &c. of Coventry.
Mich. 10 Will. III. B. R.

(5.)
Custom to
remove ad li-
bitum, good,
but that must
be return'd
positively.
See 4 Mod.
34, 36, 233.
5 Mod. 259,
431, &c.
Raym. 235,
439.
Post 432 in
pede.
1 Vent. 143.
2 Keb. 770,
796.

MANDAMUS to restore J. S. to be one of the Common-Council House; the Defendants returned, That they were an ancient Corporation, and that the King by his Letters Patent, reciting their Customs, amongst which was this of electing Persons to be of the Common-Council House, and removing them ad libitum, did grant and confirm all their Liberties, Customs, &c. and that they by Force of the said Custom came out of Mind used, & secundum formam literarum Patentium prædict. did remove him: And first, it was agreed, That the Estate whether by Custom or Charter, has this Condition annexed to it, that the Corporation might displace him at Will, without assigning any Cause; but this differed from the Case of the Recorder of Bath, who was appointed by the Commissioners for regulating Corporations: By their Custom they were to chuse one learned in the Law for a Recorder; The Corporation turned out the Lord H. and returned, he was not learned in the Law; and held good; for whoever put him in, he must be so qualified by the Custom, and he might bring an Action for a false Return, if he be a Person learned in the Laws. 2dly, This Return was held naught, because it did not appear that the Corporation had any such Power, but only by the Recital; whereas they should have returned, they had such a Power positively.

Anonymus. Hill. 10 Will. III. B. R.

(6.)
Rule to inspect the
Charter, in
order to
make Return, denied.

A Mandamus was granted to admit J. S. Mayor. It was moved, That the Mayor in Possession might have a Rule to see the Charter, that he might be able to make a Return; for that other who had sued the Mandamus, was not rightly elected: But it was denied, for he may return that; and in an Action for a false Return, shall have a Rule to see the Charter and take a Copy, and it was said, that the Court were always upon that Discrepancy.

See pag. 428.
pl. 1.

Buckly *versus* Palmer. Trin. 11 W. III. B. R.

4 Mod. 34,
233, 236, 368.
Raym. 365.

(7.)
After the Return falsified,
peremptory
Mandamus
of Right. See 6 Mod. 152.

AN Action was brought for a false Return, and a Verdict was for the Plaintiff, and a peremptory Mandamus was moved for, and opposed, because it was a hard Verdict, &c. Et sic. When an Action is brought for a false Return, a Verdict is not to be given for the Plaintiff, unless it be a hard Verdict, &c. S. C. Holt 443.

that is falsified, we cannot refuse a peremptory Mandamus. Sed See 1 Salk. 77, 78.
 nota; This Motion cannot be made till four Days are past after
 the Return of the Postea; because the Defendant has so long to
 move in Arrest of Judgment. Pas. 12 W. 3. B. R. The Case of
 the City of Exeter.

Dominus Rex *versus* The Bailiffs and Burgeses of
 Malden. Trin. 11 W. III. B. R.

A Mandamus issued, reciting quod cum they ought to chuse (8.)
 yearly two Bailiffs, out of such as had not been Bailiffs for Where the
 three years before, ideo they were commanded to chuse. They re- Return
 turned their Constitution by Letters Patent to be, to chuse two speaks of a
 ex Aldermannis, and that they had chosen two, secundum formam Constitution
 effectum literarum Patentium generally; and this was held different
 ought, for they ought to deny their Constitution to be as is men- from the
 tioned in the Writ, or shew a Compliance with the Writ; where- Writ, itought
 as they have acted according to a Constitution set forth in the Re- to deny the
 turn different from the Writ, and do not deny the Supposal of Supposal of
 the Writ; wherefore a peremptory Mandamus was granted. the Writ.
 4 Mod. 34,
 122, 136, 233.
 Post. Pl. 16.
 Cro. Car. 133.

Dominus Rex *versus* The Mayor, &c. of Abingdon. S. C. post.
 Mich. 11 Will. III. B. R. 432, 699.
 Carth. 499.
 Cases B. R.
 401.

A Mandamus was granted to the Mayor, Bailiffs and Bur- (9.)
 geses of the Town of Abingdon: The Mayor made a Mandamus
 Return and brought it into the Crown-Office, intending to directed to
 move to have it filed; and now a Motion was made to stay the the Mayor,
 filing of it, upon Suggestion, That this Return was made by Bailiffs, &c.
 the Mayor and minor Part of the Bailiffs and Burgeses, and Mayor alone
 against the Consent of the greater Number, who would have may make
 obeyed the Writ, and therefore they prayed they might disavow the Return,
 this Return and put in another. Et per Holt C. J. Where a and the o-
 Writ is directed to a single Officer, as a Sheriff, and a Return thers cannot
 is made by a Stranger, without his Privy, he may any Time disavow; but
 that Term wherein the Writ is returned, come in and disavow it, he is punish-
 but not after the Term. Dy. 182. But in this Case, where the able, if a-
 Writ is directed to several, and the Mayor, who is the most prin- gainst the
 cipal and proper Person, returns and brings in the Writ, it is Consent of
 not fit that we should examine upon Affidavits, whether there was the Majority.
 the Consent of the Majority? We will take it, and leave you to Vide post
 punish the Mayor for this Misdemeanor, if he be guilty; for it is 479 699, 701.
 a great Crime, which will not only merit a heavy Fine, but a Carth. 499,
 peremptory Mandamus will be granted, if the Return be falsified. 500.
 If they were all equal Parties, this might be another Case: The Comber. 41,
 Re- 213.
 6 Mod. 133.

Return was filed, and at the same time Leave was given to file an Information against the Mayor.

Dominus Rex *versus* The Mayor, &c. of Norwich Hill. 11 W. III. B. R.

(10.)
S. C. post
436.
Holt 444

A Mandamus was granted to the Mayor, &c. of Norwich. It was moved, That the Sense of the Mayor differed from the Majority of the Corporation, and that he would execute the Writ, whereas the Corporation were for returning an Excuse, &c. And they prayed, That the Mayor might be ordered to deliver the Writ to the rest of the Corporation; sed non allocatur; he is the Head and Principal, and take your Course against him.

S. C. ante 431.
Post 699.

Dominus Rex *versus* The Mayor, &c. of Abingdon Pas. 12 Will. III. B. R.

(11.)
Return, that A. was elected a Burgess, but did not receive the Sacrament within a Year before, per quod the Election was void, and he is not a Burgess, ill.
Ante 428, 429.
4 Mod. 233.
3 Mod. 72, 118.
5 Mod. 432, 433, &c.
2 Show. 68, 475.
2 Saund. 289.

Return must be certain to every Intent. Vide ante 430. Pl. 5. &c. ib. post 436, 586, 589. Mod. Cases 89.

A Mandamus was directed Majori, Ballivis & omnibus principalibus Burgensibus Burgi de A. (except R. and S.) setting forth the Constitution, and that R. and S. were capital Burgesses chosen by the Commonalty to stand and serve for Mayor for the ensuing Year; and that they were to chuse one of them, and they were commanded to elect one of them accordingly. They returned the Stat. 13 Car. 2. Scff. 2. c. 1. and that within twelve Years, prox. post 25 March 1663. R. & S. fuerunt electi Burgenses principales, and within a Year before their Election they had not received the Sacrament, per quod electio eorum vacua devenit & non sunt principales Burgenses; and this Return was held naught: 1st, The Court considered it without the last Words, Et non, &c. And as to that the Chief Justice said, the Writ supposes them to be Burgesses, and so the Court must attend them, and this is not answered by the special Matter of the Return, which shews only that he was once elected, and that to be a void Election; whereas he might qualify himself and be chosen again; and here is nothing to exclude the Intendment of a subsequent Election, which is according to the Supposal of the Writ. 2dly, The Court considered it with the last Words, and held the Et non sunt principal' Burgenses, &c. to be only Part of the Conclusion or Inference; and the Chief Justice said, the Law requires the most exact Certainty in these Cases, because the Party cannot traverse nor interplead; and it is not enough to offer a Matter, so that the Party may be able to falsify it in an Answer, but the Matter must be so alledged, that the Court may be able to judge of it and determine, whether it be a sufficient Cause, or not? If the Matter set forth in this Return had been so alledged

In a Plea in Bar, the Plaintiff might have replied a subsequent Election: Ergo, this Return is uncertain; for there might have been a subsequent Election.

Dominus Rex *versus* The Mayor, &c. of Rippon.
Pas. 12 Will. III. B. R.

MANDAMUS was directed to the Mayor, Aldermen and Commonalty of Rippon, to restore Sir Jonathan Jennings to his Place of Alderman of Rippon; they returned themselves to be incorporated by another Name, viz. Mayor, Burghesses and Commonalty; and farther, That Sir Jonathan Jennings, at such a Time, at an Assembly of the Corporation, came personally libere & debito modo resignavit his Office, declaring, he would continue to serve no longer in that Office; whereupon they chose another in his Room: And this Declaration in a Corporate Assembly was held good, especially since the Corporation accepted it, and chose another in his Place; but till such Election he had Power to waive his Resignation, not afterwards; and whether a Deed was necessary, or not necessary, is not material, because they have positively returned quod resignavit, which is false, if a Deed was necessary, and there was none. Also the Court held the Writ naught, because it was directed to the Corporation by a Wrong Name, but refused to grant a new Writ of Mandamus, because an Action lay against the particular Persons for the false Return of this: Ergo a new one would be necessary.

(12.)
Return of a
Resignation
in the corpo-
rate Assem-
bly and Elec-
tion of ano-
ther into the
Office, good.
1 Vent. 19.
1 Lev. 148.
2 Show. 66.
1 Sid. 14.

The Case of Andover. Mich. 12 Will. III. B. R.

FIVE Persons cannot have one Writ of Mandamus to be restored; for tho' the End of the Writ is to do Justice, yet the Foundation is the Wrong in turning them out, and the turning out of one is not the turning out of another; nor can several Persons join in an Action on the Case for a false Return. Per Holt C. J.

(13.)
Several Per-
sons cannot
join in a Man-
damus to re-
store.
See 3 Mod.
10, 11.
1 Sid. 209.
Far. 83. S. C.

43, 67, 436. Comber. 307, 308. 6 Mod. 18. 1 Shower 258, 260, 281, 364. Far. 83. S. C.

Domina Regina *versus* Twitty and Maddicot.
Mich. 1 Ann. B. R.

MANDAMUS to swear A. and B. Churchwardens, suggesting that they were debito modo electi: The Return was, A. & B. non Electi fuerunt debito modo. It was objected That it ought not to be debito modo; and it ought to be in the Disjunctive, nec eorum alter elect. fuit. Sed per

(14.)
Non fuit de-
bito modo ec-
lecti, not a
good An-
swer, unless
the Writ sug-
gests debito
modo.
S. C. Far. 83.
Holt Holt 442.

5 Mod, 10, Holt C. J. it was resolved; 1st, That one cannot be sworn on this Writ; for either both were chosen, or the Writ is conceived. 2dly, Where the Writ is to swear one debito modo electus, Quod non fuit debito modo electus, is a good Return, for it is an answer to the Writ; but where it is to swear one electus Church-warden, there quod non fuit debito modo electus, is naught; because it is out of the Writ, and evasive.

Q. 6 Mod. 25.

Anonymus. Mich. 4 Ann. B. R.

(15.)
How many
Days be-
tween the
Teste and
Return.
Ante 429.

A Rule was made the first Day of this Term, viz. That if a Corporation to which the Mandamus is sent, be above forty Miles from London, then there shall be fifteen Days between the Teste and the Return of the first Writ of Mandamus; but if below forty Miles, or under, but eight Days only: And as to the Alias and Pluries, they made no Rule, but would consider of the matter, and that the Writ should not be tested before it was granted by the Court; so that the Alias and Pluries may be made returnable immediately, as they used to be: Also the Court said, That at the Return of the Pluries, if no Return was made, and there was Affidavit of the Service, there should go an Attachment without hearing Counsel to excuse the Contempt.

Domina Regina *versus* The Bailiffs, &c. of Ipswich
Serjeant Whitacre's Case, Hill. 4 Ann. B. R.

(16.)
Variance be-
tween the
Writ and Re-
turn in the
Name of the
Corporation.
Vide post
452, 658,
& ante Pl. 8.
1 Salk. 145,
146, 151.
1 Sid. 64.
Hard. 97.
1 Lev. 50.
S. C. Rep.
A. Q. 67.
Holt 443,
445.
Mod. Cases
128.

A Mandamus was directed Ballivis, Burgensibus and Communitati villæ de Gippo, to restore Serjeant Whitacre to the Office of Recorder; the Return was, responsio Ballivorum Burgensium & Commun' villæ de Gipwico sive Burgi Gipwici patet, &c. Nos Ballivi, &c. return the Constitution so and so; and that the Recorder is amoveable pro malegesturis per Ballivos & Burgenses major' partem eorum quorum Ballivos duos esse volumus: They shew Serjeant Whitacre chosen to continue ad libitum, and that at such a Sessions of the Peace, the Serjeant had Notice but did not attend; and that having Notice to answer, he appeared and answered, and by the Bailiffs, Burgesses and Commonalty (the Bailiffs being then present) he was turned out of his said Office. Et ulterius certificamus quod Inhabitantes villæ prædictæ nunquam nuncupati fuerunt per nomen Ballivorum, Burgensium & Commun' villæ de Gippo, &c. This Case pended long, and was often argued upon several Objections; and, 1st, The Chief Justice held, That Gippus and Gipwicus were different Names, so that the Writ was misdirected; but then they should have returned the special Matter accordingly, and relied upon it;

that now they had admitted themselves to be the Corporation to whom the Writ was directed, by returning Executio, &c. And a Corporation may have several Names; and here it being started, Whether a Corporation should lose its old Name by a new Charter? the Chief Justice said it would, where the new Charter altered the very Constitution in the integral Parts of it; as if Bailiffs and Burgesses are made Mayor and Aldermen, or Mayor and Burgesses, or where an Abbot and Convent are translated into a Dean and Chapter; but if the Bailiffs and Burgesses villæ de Gippo accept a Charter, constituting them Bailiffs and Bur-
Hard. 504.
 gesses villæ Gipwici, and giving them farther Privileges, and that they shall be so called; this is a new Name only, for the old Corporation remains in the integral Parts of it. Powell being
1 Sid. 461.
2 Cro. 540.
Raym. 188.
 not satisfied in the first Point, it vanished without Resolution, discovering that Gippo in the latter End of the Return was
1 Lev. 148.
1 Vent. 82.
 with a Dash, and in the Writ without, so that then it was not
 idem. 2dly, The whole Court held, That tho' the Bailiffs
 were only said to be present, they should be intended to be con-
 senting, either actually, or as included in the major Part. 3dly
 that the Recorder is bound to attend and assist at the Ses-
 sions to direct the Corporation in the Proceedings of Justice, and
 that his Office being a publick Office relating to Justice, Non-
 attendance is a good Cause of Forfeiture. 4thly, Tho' the
 Summons or Notice Serjeant Whitacre had to answer this
 Charge, set no Time when he should appear, yet his appearing
 and answering cured the Defect of Notice in the Time, and would
 be cured want of Notice of the Charge. Palm. 453. For tho' a
 man ought to be prepared, and have convenient Time for that,
 yet he may waive this Benefit if he will; but in this Case, his
 notice was to answer his Non-Attendance at a Sessions of Oyer
 and Terminer, and therewith he was charged; whereas he is
 charged out for Non-Attendance at a Sessions of Peace, and in-
 stead answered to that, tho' not charged therewith, which the
 Court held incurable and fatal, and ordered a peremptory Manda-
 tus, and that it should be directed according to the first Writ,
 Villæ de Gippo, and must not differ; and tho' Mr. Raymond
 moved to a peremptory Writ, because he was only Recorder ad
 idem, (1 Sid. 14.) non allocatur; for the Corporation have not
 returned that; they have relied upon his Misdemeanors, and not
 on their Power.

Non-Atten-
 dance, a good
 Cause of For-
 feiture of the
 Office of Re-
 corder.
 Defect of
 Notice is
 cured by Ap-
 pearance.
 Ante 428.

A Motion
 must be for
 the Matter
 charged.

Ante 419.

Domina Regina *versus* The Mayor and Aldermen of
Norwich. Pas. 5 Ann. B. R.

(17.)
Several Mat-
ters may be
returned, but
they must be
consistent.
Vi. post. 586,
589.
1 Show. 180.
3 Lev. 46.
Lutw. 130.
Mod. Cases
211.
3 Mod. 114.
Ante 432. S. C.
Holt 444.

Election in
one Body ;
Approbation
in another.

MANDAMUS to admit Dunch to be an Alderman of Nor-
wich ; they returned the Charter of E. 4. Quod Alder-
mani onerentur & exonerentur prout in London ; and that
London, if a Person be elected Alderman by the Ward, the Court
of Aldermen may refuse him ; and that D. was elected by the
Ward, but refused by the Mayor and Aldermen ; because he had
not received the Sacrament infra Annum tunc prox. antec-
dent. Electionem suam ; and that he was turbulent and factious
and procured his Election by Bribery ; Et quod non fuit Electio
The Court agreed that several Causes might be returned, and
that either, not qualified, or not elected, had been a good Return
but the Chief Justice questioned whether Bribery would vacate
the Election, because it did not appear to be an Office concerning
the Administration of Justice, and within the Statute E. 6. And
the whole Court agreed, That as soon as D. was chose by the
Ward, it was an Election, and that the Aldermen did not choose
(having but one Person sent them) but approve ; and that before
Approbation, the Election was compleat ; as a Presentation is
before the Bishop approves a Clerk ; or as a Nomination is a per-
fect Nomination before the other presents. It follows therefore
that this Return is repugnant, and the Court cannot tell what
to believe ; for at first they admit an Election, and avoid it ; and
yet at last they return, there was no Election at all : A peren-
torious Mandamus was granted.

Domina Regina *versus* The Mayor, &c. of Derby
Mich. 6 Ann. B. R.

(18.)
Writ to one
to command
another to do
the Act, ill.
Vide post
489. pl. 51.
493. pl. 60.

MANDAMUS to the Mayor, Aldermen, and capital Bur-
geses of Derby, viz. Whereas A. and B. &c. removed
Party complaining from his Office of Burgess, commanding
them to command A. and B. to restore him, was quashed ; for
it is absurd that the Writ should be directed to one Person to com-
mand another.

Vide ante
433. pl. 13.

Anonymus.

(19.)
Several ought
not to join in
a Writ to be
restored.
2 Lev. 27,
188.
5 Mod. 11.

A Mandamus went to restore nine Persons to the Place
Office of Common-Council Men ; the Constitution was
turned, and that these nine were debite amoti. Holt C. J.
Writ ought to be quashed ; there ought not to be nine Persons

one Will; the Amotion of one is not the Amotion of another; See 1 Sid. 209.
 their Interests are several, and they may have been removed for; Mod. 10,
 several different Causes; one for one Fault, and another for 11.
 another. How can we grant a joint Restitution to them? Eyre Ante 433.
 of the same Opinion. pl. 13.
 2 Saund. 116.
 1 Vent. 167.
 1 Lev. 109.

MARRIAGES.

See 3 Lev.
 364, 376, 411.

Alleyne & Ux' *versus* Grey. Trin. 1 W. & M. B. R. 1 Show. 30.
 S. C.

IN Debt on a Bond, the Defendant pleaded *Ne unques* ac- In Debt by
 couple in loyal Matrimony; Plaintiff demurred, and had Baron and
 Judgment, for it alters the Trial; instead of trying per Feme;
 pais, it puts the Trial on a Certificate from the Ordinary; Nunques ac-
 couple is no
 and, only, It admits a Marriage, but denies the Legality of Plea.
 whereas a Marriage *de facto* is sufficient, and whether legal See 1 Lev 41.
 not legal, is no ways material. 1 Sid. 13, 64,
 387.
 1 Keb. 41.

Jesson *versus* Collins. Pas. 2 Ann. B. R. 6 Mod. 155.
 S. C.

MR. King moved for a Prohibition to stay a Suit in the Spirit- (2.)
 tual Court, upon a Contract of Marriage per verba de præsenti, or
 present, suggesting that the Contract was in fact per verba de fu- Contract per
 turo, for which, if not performed, the Party had Remedy at verba de
 Common Law: Holt C. J. said, That tho' it were per verba de præsenti, or
 futuro, equally cogni-
 zable in the
 spiritual
 Court, and
 their Sen-
 tence bind-
 ing.
 Court had Jurisdiction; and this was the great Objection against Vide 3 Mod.
 Actions at Law, when first brought up in these Cases; but in An- 165.
 swer to this it was held, That the Remedy in the Spiritual 5 Mod. 411.
 Court was waived by betaking himself to Damages for the 2 Lev. 15, 16.
 Breach: Also he said, That a Contract per verba de præsenti, was 6 Mod. 155,
 a Marriage, viz. I marry you: You and I are Man and Wife; 172.
 and this is not releasable: Per verba de futuro; I will marry you, 3 Lev. 65.
 I promise to marry you, &c. which do not intimate an actual Mar- 1 Salk. 24,
 riage, but refer it to a future Act; and this is releasable; and as 25.
 it is releasable, the Party may admit the Breach and demand

3 Lev. 65.
V. Lutw. 68;
78, 79.

See 2 Lev.
15, 16. acc.

See 6 Mod.
155, 172.

Satisfaction: He also said, he remembered this Case upon Evidence; Assumplit, in Consideration that the Plaintiff promised to marry the Defendant, the Defendant promised to marry him; upon Evidence it was proved, That there was a Promise; yet the Defendant producing a Sentence in the Spiritual Court, in Disaffirmance of that Contract, it was held good Counter-Evidence, and the Plaintiff was nonsuit. A Prohibition was denied.

Wigmore's Case. Mich 5 Ann. B. R.

(3.)
Contract per
verba de præsenti is a
Marriage.
3 Lev. 65,
411.
5 Mod. 411.
Swinb. de
Sponsalib.
Cro. El. 79.
Holt 459. S. C.

THE Wife sued in the Spiritual Court for Alimony: Fact, the Husband was an Anabaptist, and had a Licence from the Bishop to marry, but married this Woman according to the Forms of their own Religion. Et per Holt C. J. By the Canon Law, a Contract per verba de præsenti, is a Marriage: As, I take you to be my Wife: So it is of a Contract, per verba de futuro, viz. I will take, &c. If the Contract be executed, and he does take her, 'tis a Marriage, and the Court cannot punish for Fornication. Upon a Prohibition to the Spiritual Court of Peterborough.

Note; By 3 Lev. Such a Promise, if not in Writing, is void Stat. 29 Car. 2.

Marshal and Marshalsea.

See 6 Mod.
57, 225.

Anonymus. Mich. 9 W. III. B. R.

(1.)
Bond to the
Marshall to
be a true
Prisoner,
good.

PER Holt C. J. it was adjudged in the Case of Sir Lenthall versus Cooke, That the Marshall might take Bond to be a true Prisoner; but not to receive or any Thing of Advantage or Profit to himself, and if he did, the Bond was void at Common Law.

Anonymus Mich. 10 W. III. B. R.

A Prohibition was prayed to the Marshalsea, because they refused to admit a Plea, that neither of the Parties were de hospitio Regis. Per Holt C. J. This is not the Court mentioned in my Lord Coke's Case of the Marshalsea. If the Cause of Action arise within twelve Miles of London, this Court holds Plea, tho' the Parties are not de hospitio Regis; the Plea is frivolous, and we will not interpose. But Trin. 11 W. 3. B. R. An Action of Debt was brought in the Marshalsea, on a Judgment in B. R. and a Prohibition was granted.

(2.)
Jurisdiction
of the Pa-
lace-Court.

Snow *versus* Firebrass. Mich. 1 Ann. B. R.

A Scire Facias was brought against the Bail, and a Breach assigned in this, That the Defendant had not rendered himself Prisoner Mar' Marefc' Domini Regis: Mr. King objected, That it was not good, without going on and saying, coram ipso Rege existentis, for the King has another Marshal, viz. The Marshal of the Household. Et per Holt C. J. and Powell, The Earl Marshal of England was by his Office Marshal of the King's Bench, as appears by the Book of H. 6. and so continued till the Time of King James the first, when this Office was derived out of it; so that the Marshal of the King is the Marshal of the King's Bench; no Body else can be understood; the other is Mareschal-us Hospitii, and never spoken of without that Addition. The Office of Chamberlain of the King's Bench Prison is inseparably incident to the Office of Marshal; and therefore a Grant of the Office of Marshal, with a Reservation of the Office of Chamberlain, is void. Per Holt C. J. Mich. 3 Ann. B. R.

(3.)
Earl Mar-
shal of Eng-
land was for-
merly Mar-
shal of the
King's
Bench.
3 Salk. 320.
S. C.

Master

Master and Servant.

See Vang.
242, 243.
2 Lev. 27,
172.
3 Lev. 351,
352.
S. C. 1 D. 7.
p. 3. 8. p. 6.
3 Mod. 321.
1 Show. 29,
101.
Comb. 116.
2 Lev. 256.
2 Show. 478.
Carth. 58.
3 Salk. 203.
Skin. 278.
Holt 648.

(1.)

Goods are
spoiled by the
Default of
the Master
of a Ship, im-
ployed by
Owners; the
Owners are
liable in re-
spect of the
Freight.

See 3 Lev.
37, 258.
3 Mod. 91,
340.
2 Saund. 260.
Post 443.
Action lies
against the
Owners.

2 Saund. 115.
For he that
employs a
Servant, un-
dertakes for
him.

Vide Prox.
Casum.

3 Mod. 323.
Moll. 208,
209.

But the Action
must be
brought a-
gainst all the
Part-Owners.

1 Salk. 10, 31.
1 Bulst. 16.

4 Mod. 17.
3 Mod. 244.
1 Mod. 18.

Boson *versus* Sandford & al. Mich. 1 W. & M. B. R.
Intr. Hill. 1 & 2 Jac. 2. Rot. 302.

CASE against A. and B. Part-Owners of a Ship, for that he put Goods on Board, and the Defendants undertook to carry them safely for Hire, but yet were so negligent, that the Goods were spoiled: Upon Not guilty pleaded, in Evidence it appeared, that C. and D. were also Part-Owners, and that the Ship was under the Care of a Master, to whom the Goods were delivered; and this being found special it was argued pro Quer. That the Action is grounded on the Wrong, and may be against all, or any of the Proprietors. There was also another Doubt started, and that was, Whether the Owners were liable, when in Truth they did not undertake, but in Fact the Master super se suscepit? Eyre Justice held. There was no Difference between a Land-Carrier and a Water-Carrier, and that the Master of a Ship was no more than a Servant to the Owners in the Eye of the Law; and that the Power he has of Hypothecation, &c. is by the Civil Law. per Holt C. J. The Owners are liable in respect of the Freight, and as employing the Master; for whoever employs another, is answerable for him, and undertakes for his Care to all that make Use of him. 2dly the Court held, That all the Owners were liable, for they are charged in Point of Contract, as Employers, and are all equally intitled to the Freight: Either Master or Owners may bring an Action for the Freight; but if the Owners bring the Action, they must all join; ergo they must all be joined, as the Freight belongs to all, so all are equally undertaking, and a Breach of Trust in one is a Breach of Trust in all; where two make one Officer, the Act of one is the Act of the other. 3dly, The Court held this was not an Action ex delicto, but ex quasi contractu, and it was not the Contract of one but of all: That there was no other Tort but a Breach of Contract. Therefore the Court gave Judgment for the Defendant, because all the Owners were not joined.

ones ver. Hart. Mich. 10 W. III. Coram Holt C. 7.
At Nisi prius at Guildhall.

A Pawn-broker's Servant took a Pawn; the Pawner came and tendered the Money to the Servant; he said he had lost the Goods: Upon this the Pawner brought Trover against the Servant, and it was held well, per Holt C. J.
The Servants of A. with his Cart run against another Cart, wherein was a Pipe of Sack, and over-turned the Cart and spilled the Sack; an Action lies against A. So where a Carter's Servant run his Cart over a Boy, 'twas held the Boy should bring his Action against the Master, for the Damage he sustained by this Negligence. So in Lane and Cotton, a Letter with Bills in it was delivered at the Post-Office to a Servant; 'twas found, Case lay against the Post-Master and not against the Servant, unless he stole them, for then he was a Wrong-doer, as where a Gaoler suffers an Escape wilfully; otherwise if negligently. Per Holt C. J.

Pawns Vide Post 522.
(2.)
Master liable for the Neglect of his Servant, not the wilful Wrong.
See Prox. Pag. Ante 282.
2 Cro. 202.
Palm. 334.
4 Leon. 123.
2 Saund. 345.
1 Mod. 198.
Hob. 206.
3 Mod. 323.
Hurt. 121.
3 Lev. 238.
1 Show. 29.
Post 613, 614.
5 Mod. 9, 340.
2 Saund. 260.
Holt 642 S.C.
2 Lev. 172.
Ante 18.

Comina Regina versus Gouche. Mich. 1 Ann. B. R.

An Order was made by the Justices on Gouche, reciting That whereas 42 s. and 4 d. was due from him to J. S. for Work and Labour in Husbandry, they order him to pay the same; The Exception was, That it does not appear to be Statute Wages, and such only are within their Jurisdiction. Per Holt and Gould. Tho' the Statute gives them a Power only to set the Rate for Wages, and not to order Payment; yet sitting hereupon, they have also taken upon them to order Payment; and the Courts of Law are indulgent in Remedies for Wages, as appears by its suffering the Admiralty to have Cognizance of Mariners Wages; and therefore they would intend such Wages as were within the Statute: And Gould J. cited Case, The King against Dummer, An Order to pay for Days Work and Labour done, which was held well; for the Court intend it within their Jurisdiction upon general Words, unless the contrary appear upon the Face of the Order, as in the Case, 2 Jones 47. for a Coachman's Wages. Affirmed, Holt C. J.

(3.)
Order to pay 42 s. being due for Work and Labour in Husbandry, tho' it don't appear such Wages as the Statute directs. Remedies for Wages are favoured in the superior Courts.
1 Mod. 419.
Post pl. 5.
485. pl. 40.

(4.)
 Act of a Ser-
 vant binds
 not his Ma-
 ster, unless he
 acts by Au-
 thority of his
 Master, or
 he consents.
 See 2 Lev. 172.
 3 Lev. 252.
 Comber. 451.
 1 Salk. 132,
 133.
 Winch. 24,
 25.
 5 Mod. 398,
 399.
 6 Mod. 36.
 S. C.
 3 Salk. 118.
 Cases B. R.
 521.
 Holt 120.

Goldsmiths
 Notes are
 Payment
 conditionally
 only, with-
 out express
 Consent.
 See 6 Mod. 36.
 Post 507, 508.
 3 Mod. 86.
 3 Lev. 299.
 Moll. Li. 2.
 c. 10.
 Hob. 154.

Ward *versus* Evans. Hill. 2 Ann. B. R.

WARD sent his Servant to receive a Note of 50 l. of B who went with him to Sir Stephen Evans's Shop, who indorsed off 50 l. from a Note B. had upon him, and gave Ward's Servant a Note of 50 l. upon one Wallis a Goldsmith, to whom the Note was carried the next Day by Ward's Servant: Wallis refused to pay, and that Day broke; upon this the Note was sent back to Sir Stephen Evans, who refused Payment, whereupon the Action was brought. Et per Cur. It was held, That this was Money received by Sir Stephen Evans. 2dly, That the Act of a Servant shall not bind the Master, unless acts by Authority of his Master; and therefore if a Master send his Servant to receive Money, and the Servant, instead of Money, takes a Bill, and the Master, as soon as told thereof, agrees, he is not bound by this Payment; but Acquiescence, any small Matter, will be Proof of the Master's Consent, and that will make the Act of the Servant the Act of the Master.

3dly, They held this was no Payment; for a Goldsmith's Note is only Paper, and received conditionally, if paid; and not otherwise, without an express Agreement to be taken Cash.

4thly, They held, That the Party receiving such Note should have a reasonable Time to receive the Money, as in this Case the next Day, and is not obliged as soon as he receives it, to go straight for his Money.

Domina Regina *versus* London. Trin. 3 Ann. B. R.

(5.)
 In Order for
 Payment of
 Servants Wa-
 ges, if it
 don't appear
 in what Ser-
 vice, the
 Court will
 intend it
 Husbandry.
 Vide Post
 484. pl. 40.
 5 Mod. 419.
 Ante pl. 3.
 441. 3 Salk. 261. S. C. 6 Mod. 204. Set. and Rem. 231.

ORDER was for Payment of Wages, reciting, That Persons were retained by London, Overseer of the Works in the Gardens of Hampton-Court, at so much per Diem, and had work'd there so many Days; therefore the Order was, That London should pay them. Et per Cur', the Statute extends only to Servants in Husbandry, not to Gentlemen's Servants, nor to Journeymen with their Masters: Had the Order been general, viz. to pay so much to two of his Labourers, &c. or to two of his Servants, the Court should have supposed them Servants in Husbandry, but here is no Room for such an Intendment, if the contrary appears.

Merchants and Merchandize.

Vide 2 Lev.
69, 188, 228.
3 Lev. 37,
258, 351.

Jefferies *versus* Legandra. Hill. 2 W. & M. B. R.
Rot. 659.

S. C. 3 Lev.
320.
4 Mod 58.
1 Show. 320.
S. C. Carth.
216.

ACTION on a Policy of Insurance; the Defendant pleaded Non Assumpsit, and the Jury found the Policy, by which the Insurers undertook against Perils of Sea, Pirates, Enemies, &c. from London to Venice, warranted to depart with Convoy. Et per Cur', The Words warranted to depart with Convoy, mean only, That he will leave the Port, and sail with the Convoy, without any wilful Default of the Master; therefore, if by Default of the Master, the Ship is separated and taken, the Insurers are not liable; but if there be no Default, the Master having done all that could be done, and the Ship is separated and taken by Enemies, the Insurers are liable; so if the Ship be lost by Stress of Weather, for they insure against these by their own Agreement.

Holt 465.
(1.)
In Policies warranted to depart with Convoy, shall be intended without wilful Default of the Master.
Vide ante 440.
6 Mod. 13.
4 Mod. 176.
1 Salk. 31.
Molloy, lib. 2. c. 7. §. 12.
2 Keb. 717, 722.

Lethulier's Case. Mich. 4 W. & M. B. R.

ACTION on a Policy of Insurance by the Defendant at London, insuring a Ship from thence to the East-Indies, warranted to depart with Convoy; and shews, That the Ship went from London to the Downs, and from thence with Convoy, and was lost. After a frivolous Plea and Demurrer, the Case stood upon the Declaration; to which it was objected, That here was a Departure without Convoy. Et per Cur', The Clause, warranted to depart with Convoy, must be construed according to the Usage among Merchants, i. e. from such Place where Convoys are to be had, as the Downs, &c. Holt C. J. contra, We take Notice of the Laws of Merchants that are general, not of those that are particular Usages. It is no Part of the Law of Merchants to take Convoy in the Downs. Vide Yelv. 136.

(2.)
Warranted to depart with Convoy, shall intend from the Place of having Convoy.
3 Lev. 320, 321.
Molloy, li. 2. c. 7. §. 12.
4 Mod. 58.
2 Keb. 717, 722.
1 Show. 320.
2 Saund. 205.

Martin *versus* Crump. Pas. 10 Will. III. B. R.

(3.)
Survivorship.
Vide 1 Show.
188, 189, &c.
2 Lev. 188.
Comber.

474 S. C.
2 Saund. 116.
Cro. Jac. 410.
1 Rol. Rep.
421.

(4.)
Deviation
discharges
Policy from
that Time
only.

TWO joint Merchants make B. their Factor; one dies leaving an Executor; this Executor and the Survivor cannot join, for the Remedy survives, but not the Duty; and therefore on Recovery he must be accountable to the Executor for that.

Green *versus* Young. Hill. 1 Ann. B. R.

IF after a Policy of Insurance, a Damage happens, and afterwards, in the same Voyage a Deviation; yet the Assured may recover for what happened before the Deviation; for the Policy is discharged from the Time of the Deviation only.

Vide Shower 189. Kemp and Andrews: The Remedy survives between joint Merchants, but not the Interest.

Anonymus. Hill. 1 Ann. B. R.

(5.)
Detention.

A Ship insured was in her Voyage seized by the Government, and turned into a Fireship: The Question was Whether the Insurers were liable? Holt C. J. thought it was within the Word Detention, but the Cause was referred.

Bates *versus* Grabham & al'. Decemb. 3. 1703.
Coram Holt C. J. At Nisi Prius at Guild-hall.

(6.)
Policy altered
by Consent
after it
was under-
written, well.
S. C. Holt
469.

IN Case on a Policy of Insurance, upon Non Assumpsit pleaded, the Case was, Mr. Crisp being at the West-Indies, sent Letter to Bates to insure Goods on the Mary-Galley of St. Christopher's, Captain A. Hill Commander, at London: Bates carried the Letter to Stubbs, who writ Policies, and he by Mistake made the Assurance on the Mary, Captain Haslewood Commander, &c. This Policy thus made was subscribed by the Defendant: The Mary-Galley was lost, and then Stubbs applied to the Insurers to consent to alter the Policy, to which they agreed, and the Mistake was mended. It was objected at the Trial, that the Mary was a stouter Ship than the Mary-Galley and that the Insurers ought to have an Increase of Premium for the Alteration: But it was held by Holt C. J. That the Assured well lay, and that the Mistake might be set right, and that Stubbs was a good Witness; and he cited this Case, which happened when Pemberton was Chief Justice. An Insurance was made from Archangel to the Downs, and from the Downs to Leghorn; but

there was a Parol Agreement at the same Time, that the Policy should not commence till the Ship came to such a Place; and it was held the Parol Agreement should avoid the Writing.

London versus Gonfales. February 14, 1704. Coram Holt C. J. *At Nisi prius at Guildhall.*

CASE upon a Policy, which was to insure the William Galley in a Voyage from Bremen to the Port of London, warranted to depart with Convoy: The Case was, the Galley sailed from Bremen, under Convoy of a Dutch Man of War to the Elb, where they were joined with two other Dutch Men of War, and several Dutch and English Merchant Ships; whence they sailed to the Texel, where they found a Squadron of English Men of War and an Admiral: After a Stay of nine Weeks they went out from the Texel, and the Galley was separated in a Storm, and taken by a French Privateer, taken again by a Dutch Privateer, and paid 80 l. Salvage. And it was ruled per Holt C. J. that the Voyage ought to be according to Usage, and that their going to the Elb, tho' in fact out of the Way, was no Deviation; for till after the Year 1703, there was no Convoy for Ships sailing from Bremen to London: And the Plaintiff had a Verdict.

(7.)
Deviation or
not, must be
construed ac-
cording to
Usage.
S. C. Holt
469.

The Mayor and Commonalty of London versus Wilks.
Trin. 3 Ann. B. R.

Merchant includes all Sorts of Traders as well and as properly as Merchant Adventurers. Vide Spelm. Guilda. 279. b. A Merchant-Taylor is a common Term. Per Holt C. J.

(8.)
Merchant,
quid?

M O N E Y.

See 1 Salk.
25.
2 Keb. 463.
Larch 84.
Yelv. 80, &c.
infra.

Dixon *versus* Willoughs. Mich. 8 Will. III. B. R.

Indebitatus
Assumpsit in
13 l. 10s. for
nine Gui-
neas, well.
Larch 84.
Yelv. 80, 135.
Poph. 28.
Cro. Car. 515.
Palm. 407.
5 Mod. 6, 7.
Lutw. 487,
488.
1 Salk. 9, 22,
25.
S. C. Ante
311.
3 Salk. 239.
Holt 471.
Cases B. R.
100.
Comb. 327,
387. S. C.

IN Case upon four several Promises, there was a Verdict for the Plaintiff, and intire Damages: It was moved in Arrest of Judgment, that one of the Promises was ill laid, viz. That whereas the Defendant was indebted to him 13 l. 10s. for nine Guineas, he promised to pay, &c. and for not, nine Guineas ad valorem, &c. as he ought, the Value being not ascertained by Proclamation. Et per Holt C. J. 1st, Any Piece of Money coined at the Mint, is of Value it bears a Proportion to other current Money, and that without Proclamation. The Unit was the old Piece, which was in King James the First's Time, the Unit was by Proclamation raised 16 d. which was the Reason and Occasion of the Coining Guineas, and of their being 16 d. short of the Unit. 2dly, There are Guineas of 40s. apiece, and so we will intend these were, and that the Plaintiff was satisfied the rest. 3dly, That it was not necessary to set forth the Number of Guineas; for in an Indebitatus Assumpsit the Consideration only set forth to shew it was not a Debt by Bond, &c.

MONOPOLY.

Edgeberry and Stephens.

A Grant of a Monopoly may be to the first Inventor by the 21 Jac. 1. and if the Invention be new in England, a Patent may be granted, tho' the Thing was practised beyond Sea before; for the Statute speaks of new Manufactures within this Realm; so that if they be new here, it is within the Statute; for the Act intended to encourage new Devices useful to the Kingdom, and whether learned by Travel, or Study, it is the same Thing. Agreed by Holt and Pollexfen, the Case of Edgeberry and Stephens.

Vide 3 Mod. 131.
1 Mod. 18.
Vaugh. 345, 346.
3 Lev. 351, 352.
2 Jon. 53, 54.
353, &c.
2 Brownl. 296.
F. N. B. 222.
S. C. Comb. 84.
1 Rol. Rep. 4.
3 Inst. 181.
2 Inst. 540.
Holt 475.

Monstrans de Droit, &c.

Vide 5 Mod. 57, 58.
Ryly Plac. Parl. 257, 351.
Staundf. P. C. 72.

Domina Regina *versus* Mason. Trin. 1 Ann. B. R.

IT was found by Inquisition, That Ford had forfeited his Office of Warden of the Fleet, upon which it was seized in to the Queen's Hands: One Mason brought a Monstrans de Droit in Chancery on the Inquisition, and sets forth a Title, and traverses Ford's being seised of the Office, so that by consequence he could not forfeit it; the Attorney General de- murred: The Cause was brought into B. R. per proprias manus the Lord Chancellor; and now it appeared that Mason's Title, set forth, was naught; whereupon Mason, as Amicus Curiae, in- tervened still, That Ford had not forfeited, and so the Queen had no Title; and therefore it was urged, That no Judgment could be given for the Queen, and that the whole Record was here, and the

If the Plain-
tiff fails in
his Title, he
cannot take
Advantage
of Want of
Title in the
Crown, or of
a Stranger's
Title.
S. C. Far. 32.

Vide Fares.
32.

The Record
of the Inqui-
sition is only
before the
Court, with
respect to
the Plaintiff.

Vide 1 Salk.
395.
5 Mod. 57.

the Record being here, the whole Record was to be affirmed or subverted by the Judgment of this Court. Et per Cur. The very Record of the Inquisition itself is not before us, but only the Record of the Monstrans de Droit: For as to the Inquisition, the Monstrans de Droit recites it, and concludes prout patet per record. Inquisitionis in filiis Curiae Cancellariae; and the Monstrans de Droit may set forth the Inquisition, with an inter alia, and Oyer may be craved of it. 2dly, The Court held, That tho' the very Record of the Inquisition was not so before the Court, as that they could quash or subvert it, with respect to all Persons or Parties; so as no other Person could at any Time after come into Chancery and shew his Right, for that would be inconvenient; yet it was here with respect to the Plaintiff in this Monstrans de Droit, so that if thereby a Title appeared for him, the Court might give Judgment; and if the Inquisition be falsified, it shall be set aside, so far as to make Way for the Party's Right; and if the Party's Right can be collected from the Inquisition, it shall be affirmed by the Judgment; so was Holland's Case, and so is Kel. 93. 3dly, The Court held, That if it appears that he that sued the Monstrans de Droit has no Right, he cannot mend his Case by Exceptions to the Inquisition taken as Amicus Curiae, tho' by those Exceptions it appears the Queen has no Right, or that a Stranger has no Right; for the Party that sues a Monstrans de Droit, is a Plaintiff, and may be nonsuit. 4 H. 6. 12. And if he fails in his own Title, he is gone as effectually as if he were Nonsuit, and no Judgment needs to be given for the Queen; accordingly Judgment was given here, quod nil capiat per billam suam de Monstratione sua præd'.

M O R T G A G E S.

Vide 1 Chan.
Cas. 2, 22, 59,
102, 166, 285.
2 Chan. Cas.
23, 29, 52, 97,
221, 206.

Lord Ossulston *contra* Lord Yarmouth. Decem. 1707.
In Canc.

THE Earl of Yarmouth made a Mortgage to my Lord Ossulston, with a Proviso, That if the Interest was behind six Months, that then that Interest should be accounted Principal, and carry Interest. Et per Cowper Lord Chancellor this Clause was decreed to be vain, and of no use, saying, No Precedent had ever carried the Advance of Interest so far, and that an Agreement made at the Time of the Mortgage will not be sufficient to make future Interest Principal; to make Interest Principal, it is requisite that Interest be grown due, and then an Agreement concerning it may make Principal.

(1.)
Proviso,
That future
Interest, if
not paid,
shall be taken
as principal,
and bear Interest, is void.
1 Chan. Cas.
229, 52, 258.
2 Chan. Cas.
35, 59.

Taylor *contra* Wheeler. Mich. 8 Ann. In Canc.

Coppyholder in Fee surrendered to the Use of the Mortgagee in Fee, and became Bankrupt before Presentment, and there never was any Presentment made; and the Question was, whether the Assignee of the Commissioners of Bankruptcy, or the Mortgagee should be preferred? Et per Cowper Lord Chancellor, Tho' the Surrender was void in Law for want of a Presentment, and that might be the Laches of the Mortgagee in not securing it; yet the Surrender has a Lien, and bound the Land in Equity, and the Assignee ought not to be in a better Case than the Bankrupt, who was plainly bound in Equity by this defective Conveyance. Et come moy sembler, he became a Trustee for the Purchaser.

(2.)
Mortgagee
or Purchaser
precedent,
tho' by defective
Conveyance, shall
be preferred
before Assignees of
Commissioners of Bankruptcy.
See 1 Chan.
Cases 119,
150, 166,
167, 201,
&c.
S. C. Eq. Ab.
122. p. 3.
312. p. 8.
2 Vern. 564.
Vern. 267.

Cope *contra* Cope. In Canc.

On a Pan mortgage Lands, and covenants to pay the Money, and dies, the personal Estate of the Mortgagor shall, in favour of the Heir, be applied to exonerate the Mortgage: So it is, where there was no Covenant, if the Mortgagor had the Money; he.

(3.)
Where personal
Estate
shall be applied
to pay
off Mortgage
in Exoneration
of Land.
S. C. Eq. Ab.
269. p. 2.

because it was his Debt, and he is bound to make it good the Land be a defective Security; but if Grandfather mortgage and covenants to pay, and the Lands descend to his Son, and his Son dies, having a personal Estate and a Son, the Son's personal Estate shall not go in Aid of this Mortgage. A. mortgages his Land to B. and after sells it to C. for 1000 l. which includes the Mortgage-Money; C. the Purchaser shall pay the Mortgage, for he has made it a Debt in himself: But it is to be understood that this Exoneration is not to be allowed, unless there be personal Assets sufficient to pay all Legacies; for the Mortgage shall be paid out of the Land if there be not personal Assets to pay the Legacies; and if by such Payment Assets be short, the Legatees may make such Mortgagee refund.

1 Chan. Caf.
81, 223, 271,
285, 286.

1 Chan. Rep.
98, 148, 183,
191.

2 Chan. Caf.
98, 165, 187,
221.

2 Chan. Rep.
274, 396.

3 Chan. Rep.
212, 213.

Vern. 36, 37.

MOTION.

Vid. Records
565.
Rules, &c.
597, Pag. 598.
Pl. 3, & 647.
Pl. 14.

Vide post
671.

Hinton *versus* Hern. Hill. 9 Will. III. B. R.

(1.)
Franchise
cannot be al-
lowed on Mo-
tion, unless
it has been
formerly
pleaded, and
is upon Re-
cord.
Vide 1 Salk.
343, &c.
post 500.
S. C. Cases
B. R. 165.

IN a Motion for a Prohibition to the University of Cambridge, the other Side insisted on their Privileges, which are confirmed by Parliament. Et per Cur, You must plead them. The Difference is, where Franchises have been allowed on Plea, and are upon Record in Court, there they may be allowed upon Motion ever after; but where they have not been allowed, it is otherwise; and so it was held and done better in Castle and Litchfield, where the Franchise of Oxford was pleaded and so they were obliged to do here.

Domina Regina *versus* Layton. Pasch. 4 Ann. B.

(2.)
Where Fine
is set for For-
cible Entry,
Conviction
not quash'd
on Motion.
Ante 106,
353.

UPON a Conviction of Forcible Entry, if a Fine be set, the Conviction cannot be quashed upon Motion, but the Defendant must bring his Writ of Error; otherwise if no Fine be set, for then it may be quashed upon Motion; Per Cur.

Names of Purchase and Dignity.

Lev. 50. 1 Show. 392. 5 Mod. 303. Ow. 81. Pop. 209. Noy 88. 4 Co. 118. 6 Co. 53.
Salk. 6, 50.

Hob. 129.
1 Vent. 154.
Lit. R. 181,
201.
Yolv. 34.
1 Sid. 40.

AN Indictment was preferred against two Chairmen for a Battery upon Thomas Lord Marquess of Carmarthen; who was called up to the House of Lords by the Name of Lord Osborn; and it was held by the Chief Justice, that there was no such Person, or at least the Duke of Leeds was the Person, and not the Prosecutor. At the Old Bailey he was indicted for stealing the Goods of the Earl of Kingston, who was the eldest Son of the Marquess of Dorchester, and the Defendant was acquitted by the Opinion of all the Judges, for he was only Mr. Pierpoint. In the House of Lords, Complaint was made against the Marquess of Carmarthen, for Breach of Privilege, and the House said, there was no such Person: The Defendants were acquitted.

(1.)
Indictment
for assaulting
a Duke's eldest
Son, styling
him by
his Father's
second Title
according to
common Par-
lance, ill.
Post 509,
539, 512.
Parliament
Cases 2, 3,
&c.
6 Mod. 303.
Carth. 297.
Comb. 273.
Faresl. 15,
28, 38.

The President and College of Physicians, London, *versus* Salmon. Trin. 13 Will. III. B. R.

S. C. 5 Mod.
327, 328.
4 Mod. 47.

DEBT was brought in the Name of the President and College of Physicians, on the Stat. 14 H. 8. c. 15. for the Penalty of 5 l. per Month for practising Physick in London without Licence; and upon Demurrer to the Declaration, this Exception among others was taken, That the Action ought to be brought in the Name of the College only, or the President only; the Words of the Patent being, Quod ipsi per nomina Presidentis Collegii, seu communitatis facultatis Medicinæ, London, should sue and be sued. To this it was answered, That they are incorporated by the Name of President and College, and have in consequence of that a Power to sue and be sued by that Name; and this Power is not taken away by the additional affirmative Power which is farther given to them. 10 Co. 28. b. 30, 123. Ro. Ab. 513. Fitz. Brief, 485. 5 E. 4. 20. 16 H. 7. 1. 29 H. 6. 4. 4 E. 3. 6. b. 11 H. 7. 27. 13 H. 7. 14. And Judgment was given for the Plaintiff.

(2.)
Corporation
may sue by
their Name
of Incorpora-
tion, not-
withstanding
an express
Power given
to sue by
another.
See Lutw.
510, &c. 563.
Cro. El. 357.
Hard. 504.
Hob. 210.
Vid. 6 Mod.
44.
2 Bull. 185.

Domina Regina *versus* The Inhabitants of Barking
Needham-Market, and Darmesden Hamlets. Pascha
5 Ann. B. R.

(3.)
On a Certiorari to remove Orders, the Name of the Parish in the Writ, and that in the Order must appear to be the same. Vide ante 434. pl. 16. 1 Salk. 145. 146, 151. Marsh 112. 1 Lev. 50. 1 Bulst. 159. 1 Keb. 165. Far. 97. Post 472.

A Certiorari issued to remove all Orders concerning the Inhabitants of the Parish of Barking, Needham-Market, and Darmesden Hamlets; and the Orders mentioned Barking and Needham, and Darmesden Hamlets, without Market. Serjeant Welles argued that they must be taken to be the same. 1 Sid. 64. Writ was to the Justice of Chester; Return was by the Chief Justice and 1 Ro. 334. A Ward and a Liberty of a City is the same. Holt C. J. The Chief Justice of Chester, in his Patent is called Justiciarius, and there was but one till 18 Eliz. c. 8. which gave the Queen Power to make another, who is styled alter Justiciarius, and the first Justiciar, and so our Writs are directed; therefore take Notice of him, and do not regard his calling himself Chief Justice. The Reason of 1 Ro. 334. is, That a Ward of a City is no Venue, therefore the Venue is from the City: Jury may come from a Lieu conus out of a City, not from Lieu conus within a City. If Needham and Needham-Market be the same Hamlet, so it should have been returned; but cannot take Notice that there is no such Hamlet as Needham Market. If Trespass quare Clausum fregit at Needham Market brought, and the Plaintiff proved a Breaking at Needham-Market, he must be nonsuit.

Novel Assignment.

Vide 1 Mod.
89.

Coke *versus* Evans. Trin. 2 Ann. B. R.

TRESPASS for taking the Cattle in D. The Defendant pleaded, That the Locus in quo was twenty Acres, &c. where he had Common, and justifies for Damage-feasant; the Plaintiff replied, that he took them in such a Place, [viz. another] And it was agreed per Holt C. J. and Powell, that the Plaintiff might have a new Assignment, which they told Mr. Southouse, subridendo; who neither confessed nor avoided his Bar, but gave it the Go-by.

(1.)
Where Defendant by Plea makes a transitory Trespass local, the Plaintiff may make a new Assignment.
Hob. 16.

Helvis *versus* Lamb. Hill. 2 Ann. B. R.

TRESPASS for taking and carrying away his Goods in D. The Defendant pleaded that the Locus in quo was his Freehold, and that he took the Goods Damage-feasant, &c. The Plaintiff demurred generally, and had Judgment; for the Action being transitory, there is no Locus in quo supposed: Otherwise Trespass quare Clausum fregit in D. the Clausum is a Locus in quo; but in the principal Case there is no Place in particular supposed, only D. is alledged for a Venue; therefore if the Defendant will make the Place material, it must come on his Part to shew a Place certain: Also in Trespass quare clausum fregit in D. if the Defendant plead Liberum Tenementum, and Issue joined thereupon, it is sufficient for the Defendant to shew any Close, that is his Freehold; but if the Plaintiff gives the Close named, he must prove a Freehold in the Close named: So adjudged in C. B. and the Judgment affirmed in B. R. upon a writ of Error.

(2.)
Where the Place is made material by the Defendant's Plea, he must shew it with Certainty.
S. C. 6 Mod. 117.

NISI PRIUS.

Bullock *versus* Parsons. Pas. 4 Ann. B. R.

Distringas
with a Blank
for the Cause
of Action,
amendable.
S. G. Holt
496.

Authority of
a Judge of
Nisi Prius is
by Commis-
sion of Assize.
Vide post 456.
Raym. 38,
73.
2 Inst. 424.

2 Inst. 126,
127.

No Distringas
is aided
by Verdict,
ill Distringas
not.
Danv. 1 part
357.

IN Debt, after Verdict for the Plaintiff Mr. Eyre moved for Arrest of Judgment, that the Distringas was with a Blank and Debiti (the Cause of Action) omitted; so it was a Distringas in another Cause: On the other Side it was urged to be a no Distringas, and aided by Verdict; and that it was amendable. The Court made two Questions, 1st, Whether the Judge of Nisi Prius had Authority to try this Issue? Et per Holt C. J. The Authority of the Judge of Nisi Prius is not by the Distringas, but by the Commission of Assize; for it is the 13 E. c. 30. which gives the Trial by Nisi Prius, and by that Statute, the Trial by Nisi Prius is given before Justices of Assize; and at these Trials by Nisi Prius were always had and made upon the Venire Facias, and indeed the Clause of the Nisi Prius is by the 13 E. 1. c. 30. expressly ordered to be inserted in the Venire Facias and Trials by Nisi Prius continued to be upon the Venire Facias till 42 E. 3. c. 11. which requires, that the Names of the Jury be first returned into Court. By this Act two Inconveniencies were remedied. 1st, The Party might now be prepared to make his Challenges, the Panel being first returned into Court, which was not before; and, 2dly, The Defendant was prevented this means to cast an Essoin at Nisi Prius, which was used frequently before; for by Marl. c. 13. the Defendant was allowed one Essoin, and that after Issue joined upon the Return of the Venire: By Consequence, when that was returned at Nisi Prius he could essoin at Nisi Prius; but now it is returned above, must essoin above, and cannot now essoin at the Trial, because the Trial is upon the Distringas, and not upon the Venire. 3dly, The Court held no Distringas, or the Want of a Distringas, to be aided by Verdict, but an ill Distringas was not; and mentioned a Case, wherein Saunders, of Counsel at the Bar, depicted the Distringas out of his hand, that he might want a Distringas, which would be aided, and not keep and shew an ill one which would be naught. Also they held it amendable, and gave Judgment pro Quer.

NON SUIT, &c.

1 Sal. 21.
6 Mod. 95,
261.
Hard. 126,
153.
Raym 38, 73.
Farell. 32,
48, 86.

Allington *versus* Vavasor. Trin. 12 W. III. B. R.

A Latitat was sued out against four Defendants in Trespass; the Plaintiff was nonsuit for want of a Declaration, and the Defendant's Attorney entered four Nonsuits against him; and it was held to be irregular, because the Trespass is joint, and tho' the Plaintiff may count separately against the Defendants, yet it remains joint till it is severed by the Court.

(1.)
In Trespass against four, there can be but one Nonsuit for want of declaring.

Lover *versus* Salkeld. Trin. 12 Will. III. B. R.

TRESPASS against two Defendants, and Verdict for the Plaintiff; one Defendant being an Infant, the Plaintiff took Judgment against the other, and entered a Non Prof. after Judgment against the Infant: Upon this Judgment the Plaintiff sued out Execution, upon which Error was brought: And Mr. Northey objected, That the Execution and Judgment should not vary from the Demand of the Writ: Raymond confessed. Coys are several, and the Plaintiff may as well enter a Non Prof. quoad one Defendant upon a Trial by Verdict, as if the Defendant had demurred, and Verdict against the other; and that a Non Prof. may be entered after Judgment as well as before; and for Non Prof. entered after Judgment, he cited 1 E. 4. 26. 14 E. 4. 6. Hob. 71. 1 Ro. Rep. 379. 2 Ro. Abr. 100. Holt C. J. said, he supposed those were interlocutory Judgments wherein it might well be, but a final Judgment differed, that being once wrong, a subsequent Entry would not set it right. Adjournatur.

(2.)
Non Prof. may be entered as to one Defendant after interlocutory Judgment, not after final.
Vid. 1 Cro. Hager vers. Wood.
Co. Ent. 650. b. & 676. b.
Rast. Entr. 582. b.
Hob. 70, 108.
11 Co. 50. b.
3 Cro. 762.

Cooke *versus* Foster. Trin. 1 Ann. B. R.

S.C. Farell. 32.

If a Man appear at the Day of the Return of the Process and put in Bail, tho' he never was arrested, nor the Process returned; yet if the Plaintiff does not declare against him in two terms, a Non Prof. may be entered against him.

Goddard

(3.)
Where the Defendant files Bail without Arrest, Plaintiff may be Non Pros'd.

S C. 1 Salk. 21.
6 Mod. 261.

Goddard *versus* Smith. Mich. 3 Ann. B. R.

(4.)
Vide 11 Co.
65, 66.
6 Mod. 95,
262.
1 Sid. 410.

A Discharge by Nolle Prosequi upon an Indictment, is sufficient to maintain an Action for a malicious Prosecution. Vide this Case, Title Action sur le Case, pl. 11. p. 21.
1 Vent. 32. 5 Mod. 208. Hard. 126, 153. Comber. 18.

(5.)
Entries of
Non Prof.
6 Mod. 25,
216.
8 Co. 58.
2 Keb. 521.
5 Mod. 394.
Hard. 126,
153.
1 Rol. Abr.
786. pl. 2.

Vide Co. Ent. 650. d. In Trespass, several Issues, one found for the Plaintiff, & *super hoc idem quer. gratis hic in Cur. cognovit se ulterius nolle prosequi versus le Defend. de ceteris exitibus*, upon which here is an *Eat inde sine die*, and the Plaintiff has Judgment for the other: *Et vide ibi 676, &c.* Issue for Part, and Demurrer for Part, in an Action of Trespass, and Verdict *pro Quer'* upon the Issue; upon which the Plaintiff enters a *Non. Prof.* in this Manner *Et super hoc idem quer' quoad materiam predictam unde partes predictae posuerunt se in iudicium fatetur se nolle materiam illam, &c. ulterius quovismodo intromittere: Ideo idem defendens eat inde sine die, & superinde idem querens petit iudicium de dampnis predictis &c. Ideo consideratum est*, That the Plaintiff recover; and that the Plaintiff be amerced *pro falso clamore* as to the rest, & *quod defendens eat inde sine die. Vide ibi 28.* Jury came in with their Verdict and the Plaintiff was nonsuit, and the Entry is, *super quo querens solemniter exactus non revenit, nec est prosecutus billam suam super quo consideratum est quod nil capiat.*

Greeves *versus* Rolls. Pasch. 4 Ann. B. R.

(6.)
Judge of Nisi
Prius may re-
ceive a Non
Prof. at the
Assizes.
Vid. ante 454.
Raym 38, 73.
S. C. Cases
B. R. 651.
12 Ed. 2. c. 4.

In Ejectment
against several,
if some
confess Lease,
&c. and others
do not, the Plaintiff
may go on as
to the former,
and be nonsuit as to
the latter.

THE Judge of Nisi Prius may receive a Non Prof. at the Assizes; so it was held by two Judges, and that Judgment was affirmed in the House of Lords against the Opinion of Holt C. J. For before the Statute of York, the Justices of Nisi Prius had no Power to record a Nonsuit or Default in the County, and consequently have no Power now to enter a Non Prof. which is not within that Statute. At Common Law they could not record a Non Prof. Default or Nonsuit. Nota; The principal Case was, Ejectment against several, who all entered into a Rule of Lease, Entry and Duffer; at the Assizes some would confess and others would not: The Plaintiff, as to those who would confess, entered a Non Prof. and went on against the others, and recovered; upon this a Rule was made, That in like Cases the Plaintiff should go on against those who would confess, and as to those who would not, should be nonsuit; but that the Cause of Nonsuit should be expressed in the Record, viz. because those Defendants would not confess Lease, Entry and Duffer; and upon the Return of the Postea, the Court would be informed to

lands were in the Possession of those Defendants, that the Judgment might be entered against the casual Ejector as to them.

It was agreed in the arguing of this Cause, That where there are several Defendants, and they sever in Plea, whereupon Issue is joined, that the Plaintiff may enter a Non Prof. as to one Defendant at any Time before the Record is sent down to be tried at Nisi Prius.

Where several Defendants sever in Plea, Plaintiff may enter Non Prof. against one, any Time before Record sent down. 2 Rol. Abr. 100.

NOTICE, &c.

Lazier *versus* Dyer. Mich. 2 Ann. B. R.

Vide 5 Mod. 96, 129, 257, 330, 442, &c. 2 Show. 316. 2 Lev. 21, 106, 152. Lutw. 404, 409, &c. S.C. Post 650.

ISSUE being joined and entered, as of Trinity-Term, the Plaintiff rested till the Trinity Term following, and then gave Notice of Trial after the Term; and a Venire Facias and Distringas was taken out in the Vacation, but rested and entered as of the Term. Et per Cur', This is not sufficient Notice; for tho' in Law, this was a Proceeding within the Term; yet in Fact it was a Proceeding in Vacation, and therefore there was not a Term's Notice of Trial.

(1.) If there be no Proceeding in Fact within four Terms, there must be a Term's Notice of Trial. Vide Post 645.

Mod. 18, 146. 6 Mod. 57. S. C. call'd Lerauld *versus* Dyer. 1 Kob. 112. 1 Sid. 34, 231. 2 Lilly 356.

Smith *versus* Goff. Pas. 4 Ann. B. R.

PLAINTIFF declares, That whereas H. owed him 30 l. by Bond, the Defendant promised, that if the Plaintiff delivered up the said Bond, he would pay him the said 30 l. and he delivered up the said Bond to H. under the Defendant had Notice, and had not paid it. On Non Assumpsit pleaded, Verdict was for the Plaintiff: Upon Motion in Arrest it was held, That Delivery must be intended to the Obligor, for that is properly a Delivering up; and delivering up must be construed the effectual Delivering; which is such as that the Bond may be cancelled. 2dly, There needs no Notice, because the Defendant is to whom to resort to; and the Difference is, where a Person is named, and where not.

(2.) Notice not necessary to be alledg'd, where the Thing can be intended to be known without it. See 6 Mod. 182, 200, 259, 288. 4 Mod. 230, 239. 5 Mod. 330, Farell 143, &c.

NU.

N U S A N C E S.

Vide 9 Co.
57, &c.
5 Mod. 242.
Raym. 74.
6 Mod. 145.
Vaugh. 333.
340, 358.
1 Mod. 55.
76, 168, 202.

Rex & Regina *versus* Wilcox. Hill. 1 W. & M. B.

(1.)
Fine pardon-
ed by general
Pardon, but
Abatement
not excused.
Vide Vaug.
333.

THE Owner of the Glass-House at Lambeth was indicted for maintaining that House, being a Nuisance, was convicted and fined; and now it was moved, by the Act of general Pardon the Defendant was excused and discharged, both as to the Fine and the Abatement of Nuisance: But the Court upon Consideration held, That should be discharged only as to the Fine and not as to the Abatement, for that is not a Punishment of the Party, but a Remedy of that which is a Grievance to other People, and any Person may abate a common Nuisance.

See 2 Mo. 253.
Lutw. 1586,
&c.

Palmer *contra* Poultney. Mich. 8 Will. III. C.

(2.)
Quod per-
mittat lies de
Ædificio.
9 Co. 53, 54.
Cro. Jac. 555.
Cro. Car. 185.
1 Rol. Rep.
394.
3 Bulst. 197.
1 Jones 222.
2 Rol. 144,
145, 365.

QUOD permittat prosterne quædam ædificia ad nocum &c. And the Court held, That a Quod permittat tollit de ædificio; but vide Noy 68. 3 Cro. 520, 402. It is not de mole, F. N. B. 110. it lies de fabrica, F. N. B. 184. The Court held as uncertain as ædificium. Also there may be Building without a Name; and the Court held, That where the Nuisance was by the Tenant or a Stranger, the Plaintiff may maintain a Quod permittat, for 'tis the same Prejudice to Plaintiff. F. N. B. 184. Et Nota; In a Quod permittat Jury have a View; but that did not weigh with the Court, they said that could be no Direction to the Sheriff, tho' it was to the Jury.

Lodie *versus* Arnold. Mich. 9 W. III. B. R.

(3.)
In Justifica-
tion by A-
batement of
a Nuisance, it
need not be
shewn that he
did it, doing
as little hurt
as could be.

TRESPASS for breaking his Close, and throwing Bricks and other Materials there lying erga confessionem de novo erecta into the Sea; the Defendant shewed it was a Nuisance, being a House built across the Way, and that he pulled down the Walls, &c. and they rolled into the Sea: The Plaintiff demurred, and Judgment was given for the Defendant:

The Court seemed to agree, That the Trespals, which is
 justified, is not the Trespals complained of, for that was throwing
 Materials there lying; this, which is confessed, is pulling down
 Wall. 2dly, That when H. has a Right to abate a publick Nu-
 lance, he is not bound to do it orderly, and with as little Hurt in
 doing it, as can be; and therefore was not answerable in this
 Case for the Rolling into the Sea. In the Case of James against
 Hayward, the Defendant might have opened the Gate without cut-
 ting it down; yet the Cutting was lawful; and the Court denied
 his Case, 3 Cro. 384. that Matter of Aggravation needs to be
 shewed. But, 3dly, The Court held, That the Declaration
 was repugnant and insensible; there could not be Materials to-
 wards the Building of a House Erect, which is already built.

Cro. Car.
 184, 185.
 Vide 5 Co.
 Penru-
 dock's Case.

Rosewell *versus* Prior. Mich. 10 Will. III. B. R.

An Action upon the Case for erecting a Shed upon the De-
 fendant's Ground, so near the Plaintiff's House that it stopp'd
 his Lights; the Plaintiff declared, that he was possessed of a
 House which had Windows, per quas lumen inferebatur & inferri
 consuevit: After Verdict for the Plaintiff, it was moved in Arrest
 Judgment, that the House was not said to be an ancient Mes-
 suage, and the Defendant appeared not to be a Wrong-doer; for
 he may erect a Shed on his own Ground against another's Win-
 dows, if they are not ancient Lights. 3 Cro. 118. And all the
 precedents of stopping Lights have it, either antiquum Messua-
 geum or antiqua lumina. 1 Cro. 325. Pop. 170. 2 Cro. 373.
 116, 314. Sed per Cur. The Word consuevit imports Usage
 out of Mind, and we must intend, after Verdict, That
 Usage Time out of Mind was proved; and so indeed it was in
 this Case, for otherwise the Jury could not have found for the
 Plaintiff. The Court seemed to think this Declaration would
 have been good upon Demurrer.

6 Mod. 116.
 S. C.
 Vide *pro*.
 pag.

(4)
 In Case for
 stopping
 Lights, it
 must appear
 that the
 Lights were
 ancient.
 See 6 Mod.
 116, 314.
 1 Mod. 55.
 1 Lev. 127.
 &c. & infra.
 2 Lev. 194.
 9 Co. 58.
 Cro. El. 402.
 Consuevit af-
 ter Verdict in
 such Action,
 imports
 Usage Time
 out of Mind.
 6 Mod. 20,
 313, 314.
 Hutt. 136.

116. 314. S. C. 1 Vent. 274, 237. Show. 7, 64. 3 Mod. 48. 3 Keb. 133. Pop. 170. Hutt. 136.
 151. Carth. 454. Cases B. R. 215, 635. Holt 500. Lilly Ent. 31, 82, 83, 516.

minus Rex *versus* Rosewell Hill. 10 Will. III. B. R.

H. builds a House so near mine, that it stops my Lights, or
 shoots the Water upon my House, or is in any other Way a
 Nuisance to me, I may enter upon the Owner's Soil and pull it
 down; and for this Reason only a small Fine was set upon the
 Defendant in an Indictment for a Riot in pulling down some
 part of a House, it being a Nuisance to his Lights, and the
 Court found for him in an Action for stopping his Lights.

3 Lev. 133.
 1 Vent. 239,
 248.

(5)
 H. erects a
 House which
 stops my
 Lights; I may
 pull it down.
 See 6 Mod.
 314, &c. su-
 pra. 1 Sid. 167.

pra. 1 Vent. 237, 239, 274. 2 Lev. 194. Ray. 87.

S. C. ante
459. and
6 Mod. 116.

(6.)

A Tenant for
Years erects a
Nuisance, and
makes an Un-
der Lease to
B. Plaintiff
may have an
Action a-
gainst either.

See 6 Mod.

116, 314.

Ante 459,

&c. ib.

2 Roll. 144,

145.

Cro. Car. 185.

3 Bull. 197.

1 Jones 222.

9 Co. 55. a.

Rosewell *versus* Prior. Hill. 13 W. III. B. R.

IN an Action upon the Case, for that the Plaintiff being seised of an ancient House and Lights, the Defendant had erected &c. whereby they were stopp'd. There was a former Recovery for this Erection, and this Action was for the Continuance; the Case was, Tenant for Years erected a Nuisance, and afterwards made an Under-Lease to J. S. The Question was, Whether after a Recovery against the first Tenant for Years for the Erection, an Action would lie against him for the Continuance of it, if he had made an Under-Lease? Et per Cur. It lies; for he transferred it with the original Wrong, and his Demise affirms the Continuance of it: He hath also Rent as a Consideration for the Continuance, and therefore ought to answer the Damage of it. 2 Cro. 555. The Action lies against either at the Plaintiff's Election.

Domina Regina *versus* Wigg. Pasch. 4 Ann. B. R.

(7.)

Keeping
Swine in a
City, a Nu-
sance at Com-
mon Law.

See 2 Rol.

Abr. 140, 141.

Cro. Car. 570.

9 Co. 57, 58.

2 Show. 27,

30, 81, 327.

Palmer 536.

Hutt. 136.

1 Rol. 558.

1 Bull. 115.

Godb. 183.

Br. Action

sur le Case

123.

Where the

Statute makes

the Offence,

no other Re-

medy can be

pursued but

what the Sta-

tute gives;

otherwise of

INDICTMENT for keeping Hogs in some of the Streets of London, contra formam Statuti. H. Whitacre moved to quash it, because the Swine are forfeited by the Statute. 2 W. & M. Sess. 2 cap. 8. sect. 20. Ergo no Indictment lies, least not contra formam Statuti; he compared it to the Case of the Queen against Watson, which was an Indictment for keeping an Alehouse, and held not to lie, because there is another Remedy. Curia; Where a new Penalty is applied for a Nuisance, which at Common Law was an indictable Offence, as in the Case for keeping Swine in the City, which is a Nuisance, a Remedy may be pursued; but where the Statute makes the Offence, that Remedy must be taken which the Statute gives: as to its being contra formam Statuti, that is Surplusage; that was a Fault, they said, they would not quash it, being a Nuisance, but he should demur; accordingly it was demurred, and came on in the Paper, and Judgment given for the Plaintiff. Afterwards H. Whitacre moved to set aside the Judgment, alleging Surprise and Want of Notice. Sed non prevailuit; no Counsel appeared for the Defendant when Judgment was given.

otherwise of a Crime indictable before. Ante 45.

Oaths and Affidavits.

See 2 Mod.

173.

3 Mod. 108.

2 Show. 68,

475.

5 Mod. 402.

1 Chan. Caf.

11.

1 Chan. Rep.

231.

Post 549.

(1.)

Where upon

shewing

Cause new

Affidavits

may be read

to support

the Rule.

Salloway versus Whorewood. Mich. 8 Will. III. B.R.

UPON a Rule to shew Cause, the Plaintiff offered several new Affidavits, and this Diversity was taken, viz. Where they contain new Matter, and where they tend only to confirm what was alledged and sworn when the Rule was made; in the latter Case they may be read, not in the former.

Dominus Rex versus Jones. Hill. 8 Will. III. B.R.

IF Affidavits taken before Commissioners in the Country, according to 29 Car. 2. c. 5. be expressed to be in a Cause depending between A. and B. and there is no such Cause in Court, they cannot be read, because the Commissioners have no Authority to take them, and there can be no Perjury; otherwise if there be a Cause in Court, and this concerns some collateral Matter.

(2.)

Affidavits taken before

Commissioners, according to 29

Car. 2. c. 5. must be in a

Cause in Court

Davis and Carter's Case.

5 Mod. 74.

S. C.

3 Lev. 426.

Holt 501.

(3.)

Where an

Affidavit of a

Person pilloried may be

read, Vide

post 513, 514,

689.

5 Mod. 15.

3 Salk. 461.

DAVIS and Carter stood in the Pillory, and the Court would not allow their Affidavits to be read; Hill. 7 W. 3. B.R. But Mich. 4 Ann. B.R. a Motion was made to set aside a Judgment of Irregularity on the Defendant's Affidavit; and Mr. Whitacre objected to the reading it, because he was convicted of Perjury. Et per Holt C. J. Must he therefore suffer all Injuries, and have no way to help himself? Powell J. you ought to have the Record of Conviction in your hand when you make this Objection. But per Holt C. J. If he had, it would be nothing to the Purpose.

O B L I G A T I O N.

See Cro. Jac.
198, 203, 208,
290, 338, 522,
603, 607.
2 Lev. 35,
166, 220.

Henderson *versus* Foster. Hill. 3 W. & M. B.R.

(1.)
Sex triginta
libris, held
well.
Comber. 187.
S. C. 477.
4 Show. Cas.
422. 2 Rol. Abr. 146, 147. Carth. 204 S. C.

IN Debt the Plaintiff declared on a Bond, in trigint. & sex Libris solvend, &c. and upon Oyer the Words of the Bond were sex trigint' libris, and it was held well, and no Variance; for it shall be taken as one Word, as tres vigin dies Junii, was taken for the 23d of June. 1 Cro. 261.

3 Mod. 281.

S. C.

Vide ib. les

Pleadings.

3 Salk. 73, 74.

Holt 502.

Cases B. R.

193.

(2.)

Quadrans li-

brisina Bond.

Cro. Car. 116.

Mo. 864.

2 Bull. 241.

Lutw. 422,

423.

2 Jones 58.

1 Brownl.

110.

Bond made

by Erlin, sub-

scrib'd Erl-

win, Vari-

ance not ma-

terial.

2 Show. 304.

Insensible

Words re-

jected.

Vide prox.

pag. pl. 3.

2 Mod. 285.

Sum in the

Obligation

express'd in

insensible

Words, ex-

plain'd by the

Condition.

2 Cro. 146.

Yelv. 65.

Cro. El. 417.

Cromwell *versus* Grunsden. Pasch. 10 Will. III. B. R.

IN Debt upon an Obligation, the Plaintiff declared, Quod cum Robertus Erlin, primo die Julii 1674. per scriptum suum Obligatorium concessit se teneri & firmiter obligari in Quadrangint libris, &c. Et profert, &c. cujus dat. est eisdem die & anno. On Non est factum pleaded, the Jury found the Defendant made Deed in hæc verba, and that was, in premid. vigin. in quadrangint libris, dated the 1st of July, Anno Regni Car. 2. Millimo sexcent. septua' q^{to}, and signed Robert Erlwin, conditioned to pay 20 and if this be the same Deed, &c? Et per Cur.

1st, The Variance between the Name signed, which is Erlwin and the Name in the Obligation, which is Erlin, is not material because Subscribing is no essential Part of the Deed; Sealing is sufficient: The Bond is a Deed without it, and so it is the Pleat of the King. Vide Yelv. 193.

2dly, The Court held the Words in premid. vigin. and a the Anno Regni Car. 2. Millimo sexcent. septua' q^{to}, to be for Insensibility; and being insensible shall be rejected, the being Sense without them.

3dly, They held that the Word quadrans had been void and sensible, if it had stood by itself, as in Case there had been no Condition, or if the Condition had been collateral; but since it has relation to the Condition, they would take it to be explained by Condition, and to signify 40 l. there being somewhat like quadrangint. in it, and there are Cases as strong and of as Words. Hob. 119. Quamquegenta for 500 l. Yelv. 95. Cro. 147. Cro. Jac. 208. 1 Brownl. 62. 2 Ro. Ab. 146, 147. Hob. doubted. In most Cases where the Gent. or Gint. or the Se

Sept. are right, the Obligation has been held well. Vide 2 Jones *Yelv.* 105.
8. 1 Cro. 416, 418. 2 Cro. 338. *Styl.* 241,
257.

4thly, An impossible Date is no Date; and where there is no Date, the Plaintiff nevertheless must declare of it as made at a certain Time, and it is better to rest there without *cujus dat. est* *idem*, &c. or *gerens dat. eisdem*; for that ties it up to the second mentioned in the Declaration; and if that be taken to be the express Date, then there is a Variance; and the Court held, that if the Plaintiff's Declaration had been *gerens dat.* it had certainly been naught, because that could refer to nothing but the express Date; but being *cujus dat.* the Court would intend it of the real Date, which is the Delivery, and not of the express Date; because that being insensible, and as no Date, it could not properly be applied to that. Vide 2 Yelv. 193.

And the Chief Justice denied the Case, 2 Cro. 136. and held, that if H. declares on a Bond, as bearing Date the 6th of May, he cannot upon Non est factum give in Evidence a Bond bearing Date at another Day; but he may give in Evidence a Bond that bears Date the 6th of May, tho' it was delivered at another Day. Adjudged.

Wells *versus* Tregufan. Mich. 7 Ann. B. R.

DEBT on a Bond for 100l. Defendant demands Oyer of the Condition, which was, Whereas the Defendant is indebted to the Plaintiff in 50l. Now the Condition is, That if the Defendant do not pay the said 50l. on or up-
 &c. Then the Obligation to be void, &c. and pleads, That he did not pay the said 50l. The Plaintiff demurred and had judgment, for when the Condition recites a Debt, and after imposes an Obligation not to pay it, 'tis in that repugnant. Vide Sid. 109. 1 Lev. 77. 39 H. 6. 10. a.

(3.) Condition of a Bond (reciting a Debt) not to pay, is repugnant. See 2 Show. 15, 16, 504. 1 Lev. 77, 85. Raym. 61. 2 Saun. 79, 80. 2 Mod. 285. Rep. A. Q.

Оссу-

Vide Vaug.
190, &c.
3 Leon. 36.
6 Mod. 66.
Cart. 65, 66.
2 Keb. 250.

Occupant and Occupancy.

Oldham *versus* Pickering. Mich. 8 Will. III. B. R.

Estates pur
auter vie are
only Assets
for the Pay-
ment of
Debts, not of
Legacies, un-
less given
thereout ex-
pressly; nor
distributable.
Vide ante
415, &c.
Carth. 376.
S. C.
Comb. 388,
475. S. C.
3 Salk. 137.
Holt 503.
Cases B. R.
103.
3 D. 379. 8.
30. 409. p. 5

IN Attachment sur Prohibition the Case was briefly thus: Thomas Oldham being seised of a Messuage in the County of Chester, to him and his Assigns for three Lives, died intestate without Children, leaving only Anne Pickering his Sister: Administration was committed to Margaret Oldham the Plaintiff, whom the Defendant now sues in the Spiritual Court of Chester for Distribution, and to exhibit an Inventory, which she exhibited and omitted thereout the Estate pur auter vie whereupon the single Question was this, Whether an Estate pur auter vie be not distributable in like Manner, as Intestate Goods and Chattels are, according to 22 & 23 Car. 2. by force of 29 Car. 2. c. 3. which enacts for the Amendment of the Law That an Estate pur auter vie shall be deviseable, and if no such Devise thereof be made, the same shall be chargeable in the Hands of the Heir, if it shall come to him by reason of a special Occupancy, as Assets by Descent; as in Case of Lands in Fee simple; and in Case there be no special Occupant thereof, shall go to the Executors or Administrators of the Party that had the Estate thereof by Virtue of the Grant, and shall be Assets in their Hands.

And after a long Argument by Cheshire for the Plaintiff, and by Ward for the Defendant, the whole Court, viz. Holt, Rolfe, Turton and Eyre, unanimously gave Judgment, That the Prohibition should stand, and that an Estate pur auter vie belonging to an Intestate, was not distributable; for notwithstanding this Alteration by the Statute, it remains a Freehold still; and the Amendment of the Law in this Particular, was only designed for the Relief of Creditors; that if it came to the Heir by reason of a special Occupancy, it should be in his Hands as Assets by Descent, that is, liable to the Payment of those Debts where the Heir is chargeable, and of those only; but if there was no special Occupant, then it should go to the Executors or Administrators, i. e. they shall be in the Room of the Occupant, and it shall be Assets in their Hands, i. e. they shall be bound to pay the Debts of the Deceased to the Value thereof; so that it is no

much as Assets to pay Legacies, except such as are devised particularly thereout, the Statute making it Assets only for this particular Intent, to pay Creditors; and no Debts appearing in this Case, the Administrator is as it were the Occupant, and shall not be compelled to make any Distribution thereof, as he shall of Goods and Chattels, according to 22 & 23 Car. 2.

Offices and Officers.

See 1 Lev.
2, 76.
2 Lev. 71,
150, 245.
3 Lev. 200,
145, 238.
1 Lutw. 381,
1562.
Raym. 53.

Jones *versus* Pugh. Mich. 3 W. & M. B. R.

CASE for disturbing the Plaintiff in his Office of Uicar General. A Special Verdict was found, viz. That the Bishop of Landaff granted the Office of Uicar General to the Plaintiff and J. S. habend. conjunctim & divi-
m, exercend. per se vel sufficien. deputat'. It was objected, That Judicial Office could not be granted to two; for if they differ, nothing can be done: Answer, That may be said of four Judges, in B. R. and in Ministerial Offices, as two Sheriffs: The Court held the Grant good, and said, If an Office be granted to two, and one dies, the Office does not survive, but determines; if two Sheriffs, and one dies, the other cannot act; otherwise granted to two and the Survivor of them.

11 Co. 3, 6. Carth. 213, 350. Comb. 334. Skin. 446, 580.

Dominus Rex *versus* Kemp. Trin. 7 Will. III. B. R.

4 Mod. 276,
277. 8. C.

Scire Facias was brought to repeal Letters Patent, where-
by King Charles the Second granted to the Defendant
the Office of Searcher in the Port of Plimouth. The
case was, King Charles II. had granted this Office to A. du-
ante beneplacito; and afterwards by other Letters Patent, re-
pealing the first, granted it to B. for Life, to commence after the
Death, Surrender, or Forfeiture of A. Afterwards B. surren-
dered to the King, who in Consideration of the Surrender, grant-
ed the Office to the Defendant Kemp, to commence after the

(2.)
King grants
an Office to
A. durante
beneplacito,
and after-
wards grants
the same to
B. to com-
mence after
the Death,
Surrender,
or Forfeiture
of A. the lat-
ter Grant

good. 3 D. 161. p. 12. Comb. 334. Skin. 446, 580. Carth. 350. Cases B. R. 77. Holt 419.

Death

2 Rol. Abr.
154.
Cro. Car. 279.
6 Rep. 35.
Carth. 350.
S. C.

Death, Forfeiture, Surrender, or other Determination of the Estate of A.

It was objected, That the Patent and Grant to B. was void because A's Estate, being at Will, could not be surrendered or forfeited. Also an Estate of Freehold cannot depend upon an Estate at Will.

Office at Will
is at the Will
of the King,
and not of
the Party,
and may be
surrendered.
Hob. 150, 151.
Dyer 80. b.
259. a.

Et per Cur. An Estate at Will in Lands cannot be surrendered, because 'tis determinable by the Will of either Party; but such an Office at Will is not properly at the Will of both Parties, but at the Will of the King only; the Party cannot determine his Will, but by Surrender; for if it be an Office of Trust, a meer Forbearance to execute will be an Offence, and fineable and Surrender is the constant Practice in such Cases. So the Chief Justices Hale and Scroggs.

King's Tenant at Will
may forfeit,
and there
must be an
Inquisition.
2 Brownl.
241.
Dyer 197. b.
1 And. 6.
3 Leon. 5.

2dly, It may be said forfeitable in some Measure, and the King's Tenants at Will may be said to forfeit; for in Case of Forfeiture, the King will be informed by Inquisition before he determine his Will, and then upon the Return of the Inquisition the Office is forfeited; but if it were an Estate for Life, there must be a Scire Facias to repeal the Letters Patent.

3dly, If the King had turned out A. the Grant to B. may take Effect, tho' not immediately, yet after the Death of A. and the King shall appoint another in the Time.

A Freehold
to commence
in futuro,
may be in a
Rent de novo,
or in an
Office.
Vide post
577.
4 Mod. 280,
28.

4thly, That a Freehold of Lands cannot be granted to commence in futuro, or depend upon an Estate at Will; but a new Office, or a Rent de novo, may be created to commence in futuro, &c. for 'tis the Creature of him that makes it; and it is no otherwise in Being than it is in Grant. And the King does not grant a Reversion, but in Reversion; and that not in respect of a particular Estate, but because he is pleased to grant in futuro.

Gulliford *versus* De Cardonell. Hill. 8 Will. III. B.

(3.)
Bond given
by Deputy to
Principal to
pay him half
the Profits of
the Office,
good.

See 6 Mod.
234, &c.
3 Keb. 552,
659, 678, 711,
717.

Post 468. Cro. Car. 361. Cro. Jac. 269. 2 Vent. 79. Comb. 356. S. C. Cases B R. 9. Holt

IN Debt on an Obligation; on Oyer the Condition was, That whereas the Defendant was made Deputy to the Plaintiff in his Office, if he pay the Plaintiff half the Profits, then, The Defendant pleaded the Stat. 5 & 6 Ed. 6. Et per Cur. This Bond is not within the Statute, because the Condition is not to pay him so much in Gross, but half the Profits, which must be sued for in the Principal's Name; for they belong to him, tho' out of them a Share is to be allowed to the Deputy for his Service.

Saunders *versus* Owen. Trin. 10 W. III. B. R.

Vide Raym. 53.

(4)
Custos Rotulorum may appoint the Clerk of the Peace without Deed.

See 3 Mod. 150, quare 147.

Vide Noy 147, 148. Carth. 426.

S. C. 3 Mod. 386. S. C. 3 Salk. 250.

Carth. 426. Comb. 317. Cal. B. R. 199.

Lil. Ent. 278.

IN an Assize of Novel Disseisin for the Office of Clerk of the Peace of Kent, the Recognitors found a Special Verdict, That the Earl of Winchelsea being Custos Rotulorum of that County, made P. Owen Clerk of the Peace, to hold at his Measure, by Writing under his Hand and Seal; and because the Offices of Peace at Sessions scrupled to admit him upon this Paper, the Lord Winchelsea came into Court, and said, I nominate P. Owen to be Clerk of the Peace, according to Act of Parliament.

And the Court held, That it always belonged to the Custos Rotulorum to nominate the Clerk of the Peace, but the Clerk of the Peace was removeable whenever the Custos was removed or changed; and moreover was removeable at the Will of the Custos till 32 H. 8. which makes him to continue in quousque Custos shall continue in. Now by the late Act, he is to continue for Life; and tho' the Words be, Give and Grant to him; yet it is only an Appointment, and consequently may be without Deed: That it cannot be a Grant from the Custos, or enure as such, is plain, because the Custos is only at Will; and he that has an Office at Will, cannot make a Grant for Life, because there is no original Estate sufficient to bear it; therefore this must enure as an Appointment, or the Execution of a Power given by the Statute; like a Power to an Executor to sell, or a Tenant for Life to make Leases; the Consequence of all which is, that this was a good Appointment, tho' without Deed; for whatever is to take Effect out of a Power or Authority, or by Way of Appointment, is good without Deed; otherwise, where it takes an Effect out of an Interest, and is to enure as a Grant; then, if it be of a Thing incorporeal, it must be by Deed. Held upon a Writ of Error of a Judgment in the Common Pleas.

Whatever is to take Effect out of an Authority, or by Way of Appointment, is good without Deed.

Anonymus. Mich. 11 Will. III. B. R.

Erjeant Darnell moved against the Clerk of the County Court, for granting a Replevin without taking a Bond or Surety of the Plaintiff to prosecute; but the Court made no Rule, because it was a stale Cause of Complaint near two Years ago; and 'twas only a single Instance; but the Court said, that when it grew into a Practice, as if a Sheriff constantly or frequently used to let Persons at large without Bail, then it is an Abuse of his Office, and the Court will interpose. Per Cur' absente, Bying your Action.

(5)

Godolphin *versus* Tudor. Mich. 3 Ann. B. R.

(6.)
Bond by De-
puty to pay
a certain
Sum out of
the Salary
or Profits, is
good; but
where it is
without re-
lation to the
Salary or
Profits, void.
Vide ante
466. pl. 3.
3 Keb. 552,
659, 678,
711, 717.
6 Mod. 38,
234. S. C.
3 Salk. 251.

SIR William Godolphin being Auditor of Wales made a Deputy quamdiu se bene gesserit, who, by Articles of Agreement between them, was to have the Fees, and in Consideration thereof to pay Sir William 200 l. per Annum, and save him harmless. In Debt on the Bond for Performance, Judgment was given against the Plaintiff. 1st, The Court held this Office within the Statute 5 & 6 Ed. 6. c. 16. 2dly, The Court held, That where an Office is within the Statute, and the Salary is certain, if the Principal make a Deputation, reserving a lesser Sum out of the Salary, 'tis good. So if the Profits be uncertain, arising from Fees, if the Principal make a Deputation, reserving a Sum certain out of the Fees and Profits of the Office, 'tis good; for in these Cases the Deputy is not to pay, unless the Profits rise to so much; and tho' a Deputy by his Constitution is in Place of his Principal yet he has no Right to the Fees, they still continue to be the Principal's; so that as to him, 'tis only reserving a Part of his own, and giving away the rest to another; but where the Relation or Agreement is not to pay out of the Profits, but to pay generally a certain Sum, it must be paid at all Events, and the Bond is void by the Statute.

Lee *versus* Drake. Trin. 4 Ann. B. R.

(7.)
Case for di-
sturbing him
in the Exer-
cise of the
Office of Pa-
rish-Clerk.
Vide 6 Mod.
19, 21, 233.
4 Mod. 418.

CASE wherein the Plaintiff declared, Quod cum extitisset Clerk of such a Parish, the Defendant disturbed him in the Exercise of his Office, and hindered him to sit in the Clerk's Seat, per quod he lost the Profits of his Office. It was objected, That this was rather a Service or Imployment than an Office; that if it be an Office, it is Ecclesiastical, for of common Right the Parson appoints the Clerk, and the Court will not interfere to disturb a Custom; and unless a Clerk comes in by the Election of the Parishioners according to Custom, he has not a temporal Right; and the Court will not grant a Mandamus for a Clerk without an Affidavit that he is appointed by the Parish. 2dly, It does not appear that any Fees appertain unto this Office, and no Action lies at Common Law for Disturbance in the Enjoyment of a Seat in the Church, without a temporal Right; so it is here. Adjournatur.

Vide ante 435, Non-Attendance is good Cause of Forfeiture of an Office.

Office for the King.

Vide Hard.
11, 12.
3 Lev. 290.
Vaugh. 62,
64, 153.

Layton *contra* Manlove. Mich. 2 W. & M. In Canc.

SEVERAL voluntary Escapes being committed by Manlove the Warden of the Fleet, an Inquisition was found, and the King granted the said Office to Layton; and now the Commissioners of the Great Seal refused to seal the same, being of Opinion that the Inquisition was void, and ought to be quashed, because it does not find what Estate Manlove had in the Office; for there are two Sorts of Inquisitions, the one to inform, and that need not be so certain, Mo. 308. the other to vest and intitle the King to grant, and that must be certain. Jones 71, 77. 3 Cro. 895. And here no certain Estate is found to vest, and a *Melius inquirendum* cannot supply this Defect; for where an Inquisition is defective and uncertain, that cannot be supplied by *Melius inquirendum*; but where it finds some Points and not others, and that which is found is well found, there may be a *Melius inquirendum*. Per Holt C. J. Pollexfen C. J. and Bevil J.

(1.) Inquisition finding some Points well, and nothing as to others, may be supplied by *Melius inquirendum*; otherwise, if defective in the Points found.

Linch *versus* Coote. Hill. 8 Will. III. B. R.

TENANT for Life, Remainder to his first Son in Tail, Remainder to J. S. in Fee: Tenant for Life is attainted of High Treason, and dies without Issue. It was objected, That the whole Estate being vested in the King by 33 H. 8. without Office finding the Special Warrant, he in Remainder cannot enter, for the Statute vests it in the King like a general Office; and if a general Office had been found, it would have been supposed Fee. Holt C. J. No other Estate vests in the King, by Virtue of the Act of Parliament, than the Party attainted had; just as if a Special Office had been found: And therefore in this Case, as that, the Remainder-Man may enter on the King, his Estate being determined, for the Statute saves the Rights of others; otherwise, where an Office finds an Estate in Fee in the Party attainted, for then it must be abolished by *Craverle*, or *Amoveas* Sum. Vide Dyer 335. b. Hob. Sheffield and Ratchiffe, Moor 109. Cro. 640. Dy. 354. pl. 230.

(2.) A. Tenant for Life, Remainder to B. in Fee; A. is attainted. King seizes, B. may enter on the King, otherwise if an Office had found A. seized in Fee.

Orders of Justices of the Peace.

[*Vide Titles Apprentices, Bastards, Justices of the Peace, Poor, Sessions.*]

Inter Inhabitan' Dumbleton and Beckford. Pasch.
7 Will. III. B. R.

(1.)
Order to remove to B.
because Father last settled there, ill.
Ante 427.
Comb. 380,
381.
Mod. Cases
87.
Ser. and Rem.
158. S. C.

ON a Certiorari was returned an Order of Sessions Gloucestershire. A Girl of near thirteen Years old had been at Dumbleton in the said County, and had always lived there with her Grandmother; her Father was legally settled at Beckford in the same County: She wanting Relief, was by the Order charged on Beckford, because her Father was settled there. Et per Cur', The Order must be quashed; tho' till eight Years Children are counted Nurle-children, they must afterwards have Maintenance from the Parishes where they themselves are settled, and for any Thing appears she had not gained a Settlement.

Anonymus. Mich. 7 Will. III. B. R.

(2.)
In Orders to discharge
Apprentice,
the very Discharge under
Seal need not be returned.
Vide post,
pl. 4.
1 Sand. 316.

IF an Apprentice be discharged from his Master, the Statute requires that the Discharge be under the Hands and Seals of four Justices of Peace; but in a Certiorari to remove the Order 'tis sufficient in the Return to take Notice of the Order so made, for 'tis not necessary to certify the Discharge itself.

Dominus Rex *versus* Randall.

(3.)
Sessions cannot suppress
an Alehouse
licenced, unless for Disorder.
3 Salk. 27. S. C.
Holt 405.
Ser. and Rem.
265.

BY a Certiorari two Orders were removed from the Sessions Middlesex; the first whereof recited, That whereas R. Randall had lately taken a House at Hoxton, designing to sell and Beer there; and whereas the House had never been visited but by Merchants and Men of Quality, and there were Alehouses enough in Hoxton already, therefore 'tis ordered

Licence be granted to any house in Hoxton wherein Ale was formerly sold, and that no Licence should be granted to Randall: The second Order recited, That whereas a Licence was surreptitiously gotten by Randall from two Justices of Peace, that his house should be suppressed from drawing of Ale: And it was moved to quash these two Orders, because by 5 & 6 E. 6. c. 25. the Quarter-Sessions cannot controul two Justices of Peace in this Affair. Per Holt C. J. This Difference has been taken: If authority be given to two Justices of Peace to do an Aſſeſsment, and from that Aſſeſsment there is no Appeal, then it may commence at the Sessions; but if an Appeal be given, then they cannot begin at the Sessions, as 43 Eliz. and 18 Eliz. till 3 Car. 2. But the true objection here is, That except for Disorder the Justices of Peace cannot, at their Sessions, suppress an Alehouse licensed by two Justices of Peace; and the Order was quashed.

Comb. 17.
Brownl. 296.
1 Salk. 45, 46.
1 Saund. 249.
2 Keb. 506.
Godb. 178.
Ante 45.

Cominus Rex versus Gately. Mich. 7 Will. III. B. R.

ON a Certiorari it was moved to quash an Order of Sessions for the Discharge of one Edward Green from his Apprenticeship to the Defendant Gately: The fact was, That Gately was a Mountebank, and being at a Place in Yorkshire, where he kept a publick Stage, Green was by Indenture bound Apprentice to him in this Manner, viz. to Robert Gately, Surgeon, to learn the Trade he now useth; and immediately he went upon the Stage, and ever since continued in the Employ; after which, being with his Master Gately in Middlesex, he complained to the Justices that his Master did not teach him the Trade, upon which they discharged him; this being done, Green set up the Trade of Mountebank himself. Mr. Northey moved to quash the Order, the Justices being willing, because they were imposed upon: 1st, He excepted to the Form of the Order, that they ordered the Servant to be discharged from his Master, whereas the Discharge should be mutual. 2dly, Because the Stat. 5 Eliz. in discharging Apprentices is confined, and extends only to Apprentices mentioned in that Clause, and there neither Surgeon nor Mountebank is mentioned: And tho' a Surgeon may be a Trade within the Statute, which a Man cannot exercise without serving Apprenticeship to, because that Clause of the Statute is general; yet this Part of the Statute relating to the Discharge of Apprentices, extends only to Trades there mentioned. Per Cur: to the first, the Discharge of the Servant is by Consequence Discharge of the Master; and as to the second, The Clause of the Statute relating to the Discharge of Apprentices is general, and goes to all manner of Apprentices, even to those of Mountebanks, as it was adjudged in Hawksworth's and Hillary's Case, Saund. 314. But afterwards the Court was of Opinion, that the

S. C. 5 Mod.
139, 140.
Comb. 353.
Set. and Rem.
131.
(4)
Power to discharge Apprentices, extends only to such Trades as are specially named in the Statute.
Ante pl. 2.
S. C. Carth.
198, 366.
1 Saund. 313, to 317.
1 Vent. 174, 175.
1 Mod. 2, 286, 287.
1 Salk. 67, 68.

the Power of discharging reaches only to the Trades mentioned in the Statute, among which a Surgeon is not mentioned; so that tho' as to the serving seven Years Apprenticeship, a Surgeon comes under the general Terms of Arts and Mystreries yet the Power of discharging reaches only to the Trades particularly mentioned, and this Point was not stirred in *Hillary Case*; and in *Watkin's Case*, 2 Keb. 822. *Hale C. J.* was another Opinion.

5 Mod. 208,
209. S. C.
call'd *Rex*
ver. *Inhab.*
of *Harwell*.
3 Salk. 256.
Set and Rem.
266.

Inter Inhabitan' Paroch' *Oswell and Woking*.
Pasch. 8 Will. III. B. R.

(5.)
Sessions may
affirm or
quash; but
not super-
sede an ori-
ginal Order,
or make a
new one.
Vid. *Farr.*
1b. Post 483,
608.
Comb. 286,
396.
5 Mod. 396.

Ante 452.

AN Order was made upon Appeal, setting forth, That the Order of two Justices, upon a Controversy before them between the Parishes of Woking and Oswell, a poor Person was removed to Oswell, and that upon Complaint of the Churchwardens of Oswell, the Sessions ordered their Order to be superseded, and that the Person should be removed to Woking aforesaid; and it was objected, That the Act of Parliament only gives the Sessions Power to affirm or quash, but not to supersede an Order, or to suspend it for a Time; and that the Case before them being for the Parish of Woking, an Order made by them for another Parish not concerned, viz. the Parish of Woking must be void, and that the Writ aforesaid would not help it, because Oswell was the Parish last mentioned. Per Cur': Superseding is not a proper Writ, for there is a Difference between Supersedeas and a Repeal: A Commission of Oyer and Terminer that is superseded, may be revived by Procedendo, without granting a new Commission; but that cannot be in the Case of a Repeal, tho' this Writ is commonly used by Justices of Peace on such Occasions; and then there is a plain Difference between Woking and Woking, for by what appears they may be two distinct Parishes. But no Judgment was given, for the Cause was referred to a Judge of Assize.

Inter The Inhabitants of the Parish of *St. Nicholas* and
St. Helen. Trin. 8 Will. III. B. R.

(6.)
Where No-
tice shall be
presumed.
Vide post,
pl. 17.
2 Lev. 22.
Comb. 382.
Set. and Rem.
192. S. C.

TWO Orders were made for settling one *Rice*, a poor Person the first by two Justices, the other by the Sessions on Appeal, confirming the former: The Fact was, *Rice* being seven Years ago legally settled at *St. Nicholas's*, clandestinely came to the Parish of *St. Helen*, and lived there without giving Notice to the Officers of the Parish of *St. Helen* during all that Time; they sent him back to the Parish of *St. Nicholas*, &c. And the Question was, Whether living in *St. Helen's* so long as

years, should not induce the Court to presume Notice and other things requisite well done, to gain a Settlement? Et per Cur, No Person, that is not a removeable Person, is to give Notice; as he that rents a Tenement of 10 l. per Annum, a Servant, &c. need not give Notice, because they cannot be disturbed: In this case, if it had appeared upon the Order, That the Parish of St. Helen had taken Notice of him, and looked upon him as one of the Parish, as by relieving of him, making him an Overseer, &c. there, after so long a Time, we would have presumed Notice given, because the Notice need not be exactly proved; for the Church-warden to whom it was given, and the Witnesses testifying the Matter, may be dead; but here 'tis returned on the Order, that he clandestinely removed himself, so that he might still continue in the same Manner; wherefore in such Cases we must construe the Statute strictly; and therefore the Order was affirmed.

Inter Paroch' Trobridge and Weston.
Mich. 8 Will. III. B. R.

5 Mod. 325.
S. C.
Set. and Rem.
244.
Holt 572.

It was moved to quash an Order of two Justices, which recited, Whereas B. is, as we are credibly informed, the Place of his legal Settlement, not averring that it was the Place of his legal Settlement, as it ought; for that the Statute says, Every poor Person shall be removed to the Place where he was last legally settled; and it was quashed. Note; Mich. 3 Ann. B. R. it was held, That legal Settlement, and last legal Settlement are the same Thing, because by every Settlement the precedent is discharged.

(7.)
Informed that B is the Place of legal Settlement, ill. Vide post pl. 23; 26, & Pag. 492, &c. lb. Comb 413. 5 Mod. 357.

Anonymus. Mich. 8 Will. III. B. R.

An Order was made by two Justices to remove a poor Person, and Exception was taken, That it did not appear by the Order that the Justices were of the Division, or that either of them was of the Quorum: The last was held a good Exception, but the first over-ruled, for in that the Statute is only directed.

(8.)
Removing need not be by Justices of the Division. Post pl. 30. Comb. 285, 400.

Inter Inhabitant' Chittinston and Penhurst.
Mich. 8 Will. III. B. R.

5 Mod. 321,
322. S. C.

An Order for Removal of a poor Person was quashed, because it was not said that one of the Justices was of the Quorum. Holt C. J. said, This had been doubted, and perhaps adjudged

(9.)
One Justice for Removal must be of the Quorum.

Vide 6 Mod.
180.
5 Mod. 149,
162, 208, 321,
322, 325, 330.

adjudged otherwise before; but that he was of a different Opinion; for this being a special Authority, it must appear to be pursued.

Dominus Rex versus Dobbyn.

(10.)
Justices residing in the County, not enough.

AN Order of two Justices was quashed, because it did not appear they were Justices of the County, or for the County, but only residing in the County.

S. C. 5 Mod.
329. call'd
Rex ver.
Turner.

Dominus Rex versus Turnock. Mich. 8 Will. III. B. R.

Vide post pl.
16 & 34.

(11.)
Orders made upon 43 El. c. 2. must be at the Quarter-Sessions.

INDICTMENT for refusing to relieve and maintain the Wife of his Son John Turnock, according to an Order made in the Sessions, which Order was set forth in the Indictment in hæc verba, viz. Ad generalem Session' Pacis tent. apud Marston in & pro Com. Wilts, &c. and at the Motion of Mr. Eyre, the Indictment was quashed, because the Order was only said to be made at the General Sessions, and not at the General Quarter-Sessions; for the Quarter-Sessions are appointed by 2 H. 7. c. 1. tho' it appears by the same Statute, that there may be a General Session at other Times; and 43 Eliz. c. 2. s. 7. appoints Orders in these Cases to be made at the General Quarter-Sessions.

Inter Inhabitan' of Much-Waltham and Peram in Essex.
Mich. 8 Will. III. B. R.

(12.)
Ser. and Rem.
274. S. C.
Bastard born
pending an
illegal Order
of Removal
from A. is
settled in A.
Vide 1 Salk.
121.
Post 485,
528, 532.
6 Mod. 213.

MR. Comyns moved to quash an Order of Sessions for the Settlement of a Bastard-Child of E. L. She being with Child, a little before her Delivery was removed by an Order of two Justices of Peace, from Much-Waltham to Peram; before the next Sessions she was delivered at Peram of a Bastard-Child: At the Sessions Peram appealed, and the Justices judged the Woman to be legally settled at Much-Waltham, ordered her to be sent back thither; after which an Order was made for settling the Child at Peram, which Comyns moved to quash, because, tho' regularly Bastards must be maintained to be born, yet in this Case, where there seems to be a Contrivance, it shall not be so, as in Tumings Case, 2 Bul. 349. When an Order is reversed, all Things happening subsequent thereunto shall be avoided thereby: This Child being born pending the Order, shall be esteemed in Law to be born in that Parish where the Mother on the Appeal is returned back. The Court seemed to agree this; and a Rule was made to shew Cause, but was shewed.

The Case of the Parish of Amner. Mich. 8 W. III. B. R.

THE Case was, At the Complaint of the Church-wardens of Terrent-Keinston in Dorsetshire, to Sir John Morton and John Gould, two Justices of the Peace of the said County, concerning a poor Man and his Wife; they the said Justices adjudged him to be last legally settled at Tirrin-Crawford, upon which they appealed; and there it was ordered, That it appearing to the Sessions that he was last settled at Amner, therefore they discharge Tirrin-Crawford, and order the poor Man to be removed to Amner: This was quashed upon the Motion of Mr. Serjeant Gould, because this was to make an original Order, which the Justices at Sessions have no Power to do; they might have reversed the first Order, and ordered the Party to be carried back to Terrent-Keinston, but they could not remove the Party to Amner, a third Parish, who was no Ways concerned in the Order or Appeal; and if they are really chargeable with it, it must be at the Complaint of Terrent-Keinston to two Justices of the Peace.

(13.)
Sessions on
Appeal can-
not send to a
third Place,
nor Party.
Post pl. 20,
25, 32, 45,
and 58.
S. C. Set. and
Rem. 268.

Enter the Inhabitants of the Parish of Chittinston and Penhurst. Mich. 8 Will. III. B. R.

AN Order was made to remove a poor Person from Chittinston to Penhurst, and this was quashed, because 'twas not said that one of the Justices was of the Quorum: Holt C. J. said, That some indeed had been of Opinion that an Order was good, notwithstanding this Omission, and perhaps it has been so adjudged; but he was of Opinion, That this being a special Authority to Justices out of Sessions, it ought to appear that that Authority was exactly pursued.

(14.)
Authority gi-
ven to Justi-
ces of the
Peace must
be exactly
pursued.
Vide Faresly
99.
Mod. Cases
99.
S. C. 5 Mod.
321.
Set. and Rem.
271.
Holt 507.

Dominus Rex *versus* Matthews. Hill. 8 Will. III. B. R.

MR. Mountague moved to quash an Order for maintaining a Bastard-Child: 1st, Because 'twas not said the Child was likely to become chargeable: And 2dly, The Defendant was ordered to pay 18 d. per Week indefinitely, without limit, any certain Time: Shower answered, That no Order relating to a Bastard-Child can be quashed, except the reputed Father be present in Court, quod Curia concessit; however this being a hard Case, a Rule was made to shew Cause; and being shewed again the next Term, the Court would not quash it, till the reputed Father came into Court; and the first Exception was

(15.)
Upon Mo-
tion to quash
an Order of
Bastardy, the
reputed Fa-
ther must be
present in
Court.
6 Mod. 180.

over-ruled; for 'tis self-evident, That every Bastard-Child is likely to become chargeable.

Purnall's Case. Hill. 8 Will. III. B. R.

(16.)
Vide 5 Mod.
329.
Ante pl. 11.
Post pl. 34.
S. C. Set. and
Rem. 140.

AN Order upon H. for maintaining his Daughter, was quashed; because it was recited to be made ad Generalem Sessionem Pacis, and not ad Quarterialem Sessionem Pacis, according to the Statute 43 Eliz. c. 2.

Inter the Inhabitants of Talbury and the Hamlet of Foston in Scropton. Hill. 8 Will. III. B. R.

(17.)
Nothing will
amount to
Notice in
writing to
make a Set-
tlement that
is not speci-
fied in 3 & 4
W. & M.
c. 11.
Ante pl. 6.
Comber. 382.
5 Mod. 454.

Carth. 28.

AN Order was made by two Justices of the Peace in Derbyshire, to remove Robert Floud to Foston in the Parish of Scropton. Upon Appeal the first Order was quashed, and the Party ordered to be removed to Talbury, and the Matter of Fact being now stated specially to the Court; the Case was, Floud was born in Talbury, and served seven Years Apprenticeship there, which ended in the Year 1693: Since 1693, he lived in Foston and other Places out of the Parish of Talbury, and the Blacksmith that lived at Foston dying, and the Inhabitant wanting one, in 1694 Floud went thither, and rented the Shop and a Chamber of the Widow of the former Blacksmith for Year, at 52s. per Annum, with the Consent of the Bailiff of the Lord of the Manor: Here he worked publickly, was publickly employed by the Parishioners, and particularly by the Bailiff of the Lord of the Manor, the Vicar, and the Justice of Peace and now having never given Notice, nor rented a Tenement of 10l. per Annum, or exercised any Office, the Question was, Whether this publick Way of living was not tantamount and equivalent to Notice in writing, which was only designed to prevent clandestine Entries and Livings. Et per Cur', This publick Notice taken by the Parish, might perhaps have satisfied the Statute 1 Jac. 2. but there being Doubts concerning the Notice prescribed by that Act, the 3d and 4th W. & M. c. 11. was made to explain it, and this latter Statute hath particularized the Notice and what shall be tantamount to it, and what not; but this is not among the Particulars of the Statute; for which reason the Order was confirmed.

Hatton's Case. Hill. 8 Will. III. B. R.

AN Order was made by five Justices to maintain a Bastard-Child; and it was objected by Broderick, That the Complaint is not said to be by any Parish or Officers there, but only of a Town which may include several Parishes; but the Court held that well enough. 2dly, That the Order is under the Hands of five Justices, whereas it should be only the two next; but the Court held that well, for the Statute is not restrictive to two, but there must be two at least. 3dly, That it does not appear that either of those was a Justice of Quorum; upon this it was quashed, but the Party was bound to appear at the next Sessions.

(18.)
Order of Bastardy under the Hands of more than two Justices, well.
Post. pl. 22.
Mod. Cases 180.
S. C. Sett. and Rem. 272.

Inter Inhabitan' Cockfield and Boxstead. Hill.
8 Will. III. B. R.

ANNE TALBY was by Order removed from Cockfield to Boxstead; and this Order being appealed from, was confirmed at the Sessions; but the Sessions after that made an Order of Review, and quashed the former Order of Sessions, because made by Surprise. Et per Cur', The Order of Review must be quashed, for the Justices have no Power after the first Sessions.

(19.)
Sessions.
Comber. 418.
S. C. Sett. and Rem. 177.

Dominus Rex *versus* Harding. 8 Will. III. B. R.

A Certiorari was directed to the Lord Mayor and Justices of Peace of London, to remove an Order; before filing whereof a Procedendo was prayed: The fact was, the Servant of one Harding complained to the Sessions, that her Master was in Arrear to her for Wages: On hearing the Matter, both Parties agreed to refer it to Sir Thomas Lane, late Lord Mayor, to be determined; which was done accordingly by Order of Sessions: He made an Award or Order, but before Report made thereof, this Certiorari was now brought, whereon a Procedendo was now prayed. Et per Cur', A Judge of Nisi Prius, by Consent of Parties, may make a Rule to refer a Cause, but the Sessions cannot do so, tho' by Consent: They may refer a Thing to another to examine, and make Report to them for their Determination, but cannot refer a Thing to be determined by the other: And therefore the Certiorari was filed, and no Procedendo granted.

(20.)
Sessions cannot refer a Matter to be determined by another.
Ante pl. 13.
Post pl. 22.
S. C. Sett. and Rem. 269.

*Inter The Inhabitants of the Parish of St. Mary le More
and Heavy-Tree in Devonshire.*

(21.)
Settlement
by Payment
of Parish-
Rates.
Vide post
523. pl. 1.
and pag. 536.
1 Show. 12.
Comb. 284,
410.
Mod. Cases
58.

FACY was settled at Heavy-Tree, and afterwards went into the Parish of St. Mary le More in Exeter, and took a House there of one Pound per Annum, wherein he lived a Year and a Half, and paid the Rates and Taxes due for the said House; and the Justices at Sessions held, That the Rate for a House, without a Rate on his Person, was not sufficient to make a Settlement; but the Court of King's Bench quashed this Order for this Cause, and held him settled at St. Mary le More.

Dominus Rex versus Beard

(22.)
Order of Bastardy ill, because Examination by one Justice only.
Ante pl. 8,
10, 18.
Post pl. 50.
Post pl. 34.

AN Order made by two Justices of the Peace in Suffex, adjudged Beard to be the Father of a Bastard-Child, which was quashed, because it appeared thereby, that the Examination of the Woman was by one Justice only, tho' the ordering thereof was said to be made by both; and Beard was bound over to the next Sessions.

*Inter Inhabitan' St. Giles Cripplegate and Hackney.
Pas. 9 Will. III. B. R.*

(23.)
Place of last legal Settlement must be adjudged.
Vide ante pl. 7. post pl. 26.
and post pag. 491, &c. ib.
Comb. 413.

WHEREAS Complaint has been made to us, that Elizabeth Fulford, Wife of Uriel Fulford, is lately come into the Parish of St. Giles Cripplegate, and is likely to become chargeable to the same; and whereas, on Oath made by the said Eliz. Fulford, it appears that her Husband was last legally settled at Hackney; these are therefore, &c. Quashed, because there is no Judgment of the Justices concerning the last legal Settlement, but only the Oath of the Woman.

Dominus Rex versus Barebaker. Pasch. 9 Will. III. B. R.

(24.)
To maintain his Bastard till the Age of fourteen, ill.
1 Mod 20.
1 Vent. 210.
2 Keb. 23.
Comb. 320,
321.
S.C. Ante 121.
Black. 234.
Set. and Rem.
145.

ORDER upon H. adjudging him to be the Father of a Bastard-Child, and ordering him to pay 3 s. per Week till the Child attain the Age of fourteen Years, was held naught; for they have no Authority but to indemnify the Parish, by obliging him to maintain the Child as long as it shall be chargeable to the Parish.

Anonymus. Pasch. 9 Will. III. B. R.

AN Order made by two Justices of the Peace for settling a poor Person, was quashed by the Sessions; but because it did not appear that it came before them by Way of Appeal, with which they have no Jurisdiction, this Order of Sessions was quashed. (25.) Where the Sessions quash an Order, it must appear to be on Appeal.

See pl. 13, 20. S. C. by the Name of Jerrison's Case, Comb. 445. Set. and Rem. 176. Skin. 5 Mod. 328. Cases B. R. 132.

Inter The Inhabitants of Berry and Arundel.
Pasch. 9 Will. III. B. R.

WHEREAS Complaint hath been made to us, That Jacob Duckin with his Wife and Children, came from his place of Abode and last legal Settlement in Berry to Arundel; we therefore require you, &c. Naught; for there is no Adjudication of the Justices, which was his last legal Settlement, but by a Complaint, that Berry was, which doth not appear, whether true or false. (26.) Want of Adjudication of last legal Settlement. Post 491, &c. Ib. & ante Pl. 7. 5 Mod. 325, 397. Comb. 413. S. C. Set. and Rem. 257.

Elizabeth Ashley's Case. Trin. 9 Will. III. B. R.

TWO Orders were removed by Certiorari, but the Return was quashed; because the Return in the Schedule annexed to the Writ was not made by two Justices, but by the Clerk of the Peace, who was not the Person to whom the Certiorari was granted, and thereupon a new Certiorari was granted. (27.) Return by the Clerk of the Peace, ill. Vide Pa. 431, 699, 701. S. C. 3 Salk. 258. Cases B. R. 138. Set. and Rem. 259.

The Case of Chesterfield. Trin. 9 Will. III. B. R.

JERRISON was a Servant to Sir Paul Jenkinson in Waltham; afterwards he left his Service and was put out by his master Sir Paul Jenkinson, to a Barber in Chesterfield, who was to teach him to shave and make Periwigs, for which he was to have 5 l. from Sir Paul: Jerrison continued a Year in this employment, according to Covenants between Sir Paul and the Barber, to which Jerrison was no Party; and the Court adjudged that this did not make a Settlement at Chesterfield, because he was no Servant; and that the said Jerrison was thereby no more than a Boarder there for his Education, which is no Settlement. (28.) Covenant between the Master and third Person, the Servant not being Party, makes no Apprenticeship. Post 533. S. C. Skin. 671. 5 Mod. 308. Carth 400. Comb. 445. Cases B. R. 132.

Dominus Rex *versus* Brown. Trin. 9 Will. III. B. R.

(29)
Appeal from
Order of Ba-
stardy must
be to the first
Sessions after
Notice to the
Father, of the
first Order.
Ante Pl.
11, 16.
Post pl. 34
Comb. 448.
S. C.

AN Order was made, adjudging Brown to be the Father of a Bastard-Child, May 2, 1696. And in the Michaelmas Sessions following, the said Order was discharged: Now both Orders being here, the latter was quashed, because it did appear thereupon, that Michaelmas Sessions was the first Sessions after Notice given to the reputed Father, of his being so adjudged; tho' 18 Eliz. appoints the Appeal not to be to the first Session after the Order of the two Justices, but the first Sessions after the Party hath Notice of the said Order; yet by the Statute H. 5. there might be a Sessions intervening, as in this Case between the Order by the two Justices and the Order of Sessions; and it must appear on the Order, that this was the first Session after Notice had of the former Order: After which the first Order by the two Justices was quashed, because there was an Adjudication therein, that the reputed Father should pay a certain Sum weekly, till the Child be of seven Years of Age; whereas they cannot charge the Father for any certain determinate Time, but as long as the Child shall be chargeable to the Parish.

Elizabeth Ashley's Case. Trin. 9 Will. III. B. R.

(30.)
Justices need
not be said
to be of the
Division.
Ante pl. 8.
Comb. 285,
400.
5 Mod. 322.

EXCEPTION was taken to an Order of two Justices, to remove, &c. because it was not said that the two Justices were of the Division, according to 13 & 14 Car. 2. Sed non aliter; for the Court held the Statute as to this to be only directory, and not restrictive or qualificatory, as that of the Quorum is.

Inter The Inhabitants of Dimchurch and Eastchurch Hill. 9 Will. III. B. R.

(31.)
Order for
making one
Parish con-
tributory to
the Poor of
another.
Comb. 242,
309.
S. C. Ser. and
Rem. 221.
Holt 573.

AN Order was made at the Quarter-Sessions originally, stating forth, That whereas the Parish of Dimchurch was overburdened with Poor, and the Parish of Eastchurch had no Poor, the Parish of Dimchurch should be annexed to the Parish of Eastchurch, and that the Occupiers of Lands there should contribute 20 l. per Annum, by equal monthly Payments to Dimchurch, as long as that was overburdened with Poor, and Eastchurch had none: And it was objected by Mr. Brewer, That Justices of Peace cannot alter Parishes and annex one to another. 2dly, That the Sessions cannot make an original Order

er Holt C. J. There are two Ways by 43 Eliz. to make one Parish contributory to the Poor of another Parish, viz. either the Justices may tax particular Persons in aid to that Parish which cannot relieve its own Poor; or they may assess the whole Parish a certain Sum, and leave it to the Church-wardens and Overseers to levy the same, or particular Persons, which was well done in this particular Case; but so much of it as concerns the joining of the Parishes, is void, and the rest good. But the Court took Time to advise.

Skin. 258,
259.

er Inhabitan' Paroch' Downhead and Broadchalk in Wilts. Hill. 9 Will. III. B. R.

TWO Justices of the Peace made an Order to remove John Rainsford, his Wife and three Children, from Rowdrough in Somersetshire, to Broadchalk in Wilts, which Order, upon Appeal to the Quarter-Sessions, was confirmed; after this Rainsford, with his Wife and three Children, came into the Parish of Downhead; whereupon two Justices, reciting the former Order and Confirmation, ordered him to Broadchalk; and now it is objected to this Order, that it did not appear that one of the Justices was of the Quorum. Mr. Northey on the other Side answered, it was not necessary here, because it was not an original Order, but an Order made in Pursuance of an Order of Sessions per Cur', A Settlement by Order upon Appeal, binds all Parties: If the poor Man goes to the Parish from whence he is removed, the Sessions must see their Order obeyed; but if he goes to another Parish not concerned in the Appeal, then it is proper for two Justices of the Peace to remove him to the Parish where he was settled by the Sessions by original Order; but then it must appear therein that one of them was of the Quorum. Quashed.

(32.)
After Order confirmed on Appeal, if the Person goes to a Parish not Party, he must be removed by original Order.
Vide ante Pl. 13, 20, 25.

er Inhabitan' King's Norton in Wigorn and Swolhill in Warwic. Hill. 9 Will. III. B. R.

AN Order was made to remove a poor Woman from Yarly in Worcestershire, to Swolhill in Warwickshire; afterwards two Justices in Warwickshire made an Order to remove her to King's Norton in Worcestershire; whereupon two Justices of Worcestershire sent her back to Swolhill; and upon an Appeal to the Sessions in Warwickshire, the Justices confirmed her Settlement at King's Norton, and then an Order was made by two Justices of the Peace to execute the said Order: All these Orders being brought up by Certiorari, Carthew moved to quash all except the first, the others being made coram non iudice; for when an original Order

(33.)
Order of two Justices binds against all Parishes, till repealed.
Vide Post Pl. 49, & 52.
5 Mod. 416.

der

der is made, it binds all Persons until it be set aside, and cannot be set aside but on Appeal to the Sessions. Mr. Northey on the other hand insisted, That tho' in this Case two Justices could not send the Woman back again to Yarley, yet they might send her back to a third Place, as King's Norton is in this Case; that as to King's Norton 'tis but an original Order; but the Court seemed to be of another Opinion, for then King's Norton might send to Yarley, and there would be a perpetual Circuit, but seeing in this Case King's Norton had appeared at the Sessions, and had been concluded there, they would not quash the Order, and several other Questions arising, all was referred to Judge of Assize.

Dominus Rex *versus* Shaw. Trin. 10 Will. III. B. R.

(34.)
Appeal from
Order of Ba-
stardy, must
be to the
General
Sessions.
Ante Pl. 11,
16, & 29, &
Post pl. 38.
S. C. Carth.
455.
Set. and Rem.
135.
Cases B. R.
203.

AN Order was made by two Justices of the Peace, adjudging Shaw to be the reputed Father of a Bastard; whereupon appealed to the next Quarter-Sessions of the Peace, after Justice, where the Order of the two Justices was discharged; and now it was here moved to quash the Order of Sessions, because by the Statute the Appeal must be to the next General Sessions and there might have been a General Sessions before the next Quarter-Sessions, as in London and Middlesex, where there are four General Sessions in a Year, besides the general Quarter-Sessions. Quashed for this Fault.

Anonymus. Mich. 10 Will. III. B. R.

(35.)
Order to re-
move A. and
his Family, ill
for Genera-
lity.
Post pl. 41.
Farell. 54.
Comber. 478,
479.
Post 528.

AN Order made to remove three Men and their Families was quashed, quia too general; for some of their Families might not be removeable. If a Man settled at A. marries a poor Woman who is settled at B. and has Children by a former Husband; his Wife shall be removed with him to A. but his Children, such of them as are above seven Years old, shall not be removed; those under shall be removed, but that only for the future; for they shall be kept at the Charge of the other Parish. But such a general Order sweeps all away.

Anonymus. Mich. 10 Will. III. B. R.

(36.)
First Order
failing, all
subsequent
fall to the
Ground.

PER Northey, it was settled in the Case of Wootton-Bassett that if the first Order be naught, no subsequent Order on Appeal can make it good. Hill. 11 Will. 3. B. R. Same Resolution was taken by Holt C. J. and both Orders quashed; and 2 Ann. the same Resolution between Selon and Ripley.

The Case of The Parish of St. Leonard Shoreditch.
Mich. 10 Will. III. B. R.

THE Church-wardens, &c. made a Rate for Relief of the Poor, which was confirmed by two Justices, and therein nothing was taxed for the personal Estate, but all upon the real, which was erroneous. Several Inhabitants appealed to the Sessions, and the Rate was there quashed; and the Church-wardens, &c. ordered to make a new Rate, upon both real and personal Estates: In the new Rate there was still a great Inequality, the real Estate being taxed ten Times more, in Proportion, than the personal Estate; for this Reason several Inhabitants appealed again, and this Rate was likewise vacated by Order of the Sessions. And now Northey and Shower moved to quash these Orders, urging, That the Sessions could only relieve particular Persons over-rated or grieved, but could not set aside whole Rates once. Sed per tot. Cur. viz. Holt, Rokeby and Turton: Surely the Justices at Sessions, upon an Appeal of particular Persons grieved, may, if they see Cause, set aside the Rate; for the Act is, that if any Person or Persons find themselves aggrieved, it shall be lawful for the Justices at the Quarter-Sessions to take such Order therein, as by them shall be thought convenient. 43 Eliz. c. 2. sect. 6. If Sessions set aside a whole Rate, they may make a new one: And in either of these Cases, of the first or second Rate, the Justices could not have given Relief without setting aside the whole Rate, because the Rate was burthensome to a whole Set of Men; and they may make a new Rate themselves, or order the Church-wardens and Overseers to make a new Rate, as was done in this Case; they having it in their Discretion to make a new Rate at Sessions, or remand it to the Church-wardens, &c. to make one. The Orders were confirmed.

(37.)
On Appeal from a Poor's Rate the Sessions may quash the whole, and make, or order Church-wardens, &c. to make a new Rate. Vide ante 472.
Farefly 10. Ser. and Rem. 236. S. C. Holt 508. Carth. 464. Cal. B. R. 212. Carth. 38.

If Sessions set aside a whole Rate, they may make a new one:

Or refer it back to the Church-wardens, &c.

Dominus Rex *versus* Albertson. Mich. 10 Will. III. B. R.

AN Order was made, reciting, Whereas it appears to us, that two Justices of the Peace, That Mary Spencer, Wife of Jonathan Spencer, Mariner, was on the 20th of March 1695, delivered of a Male Bastard-Child, which is likely to be chargeable, &c. And whereas it appears to us, that the said Jonathan Spencer was employed on Board the Ship called the Pembroke, in His Majesty's Service at Cadiz, and was not within the King's Dominions when the said Child was begotten, or born; and whereas it appears that Albertson had carnal Knowledge of the Wife of the said Woman, during the Absence of her Husband, that he begat the said Child; we therefore adjudge him to be

S. C. Carth. 469. Holt 507. Ser. and Rem. 136. (38.) Child born of a Feme Covert, the Husband being at Sea, from before the Time of Begetting to the Birth, is a Bastard; but that must appear in the Order. 5 Mod. 419.

the reputed Father, and to pay weekly, &c. And the said Order being confirmed upon Appeal, was brought here by Certiorari. And now Shower and Upton moved to quash these Orders, because 18 Eliz. c. 3. gives the Justices Power only to meddle with Bastards born out of lawful Matrimony; so that tho' this Child should be a Bastard, yet the Justices cannot meddle with it, because he is born in lawful Matrimony: But it does not appear this Order, that this Child was a Bastard; for 'tis only said, Father was absent when the Child was begotten, or born, in Disjunctive; also it doth not appear, but the Husband was in England during the Time intermediate between the Begetting and Birth. Per Cur', he is a Bastard who is born of a Woman and Wife while the Husband, at and from the Time of the Begetting to the Birth, is extra quatuor Maria: In Case of a Bastard by him, the Tenant may plead general Bastardy; and a Writ to the Bishop, he will certify him to be a Bastard; but then a Bastard as to Descent, there is no Reason why he should not be a Bastard as to all other Intents, and in particular Bastard within 18 Eliz. which is a remedial Act: Also where a Child is born in Adultery, he is born out of the Limits of lawful Matrimony, the Law then taking no Notice of the Husband and so, tho' we must quash this Order, because it does not appear that the Husband was extra quatuor Maria, during all Space of Time intervening between the Begetting and Birth, yet we hope Care will be taken to make a new Order without this Fault. Quashed. But the Defendant was bound over to appear at the Sessions.

The Case of The Church-wardens of Topsham. H.
10 Will. III. B. R.

(39.)
Justices may
make an Or-
der, that the
last Overseers
pay the suc-
ceeding what
remains in
their Hands.
Vide post
524, 525,
531, 533.

THREE Justices took the Account of the Church-wardens &c. of Topsham, for the Year 1697, and adjudged that there was thereupon due from them to the Parishioners of Topsham 69 l. 18 s. 10 d. for the Re-payment whereof to the succeeding Overseers for the Year 1698, the Justices made an Order which it was excepted, That the Justices had no Power to make such Order, but only to issue Warrants to distrain; but the Court ruled the Order to be well made, and confirmed the same.

Dominus Rex versus Gregory.

(40.)
Wages.
5 Mod. 419.
Ser. and Rem.
232. S. C.

AN Order was made by the Justices of Peace for the Defendant to pay 40 s. for Wages generally; and because he did not say for what Wages, 'twas moved to quash it; for the

ly settle Wages in Husbandry: But per Cur', We will intend for such Wages, since the contrary does not appear.

Vide ante
442. pl. 5.

The Case of Sylvanus Johnson.

THE Justices of Suffex, on Complaint that J. was come into the Parish of Brood, in the said County, and was likely to become chargeable to the said Parish, and adjudging andherst in Kent to be his last legal Settlement, ordered that Johnson, and his Wife and Family, should be removed to Sand-herst; which was quashed; because non constat what is meant by his Family, and some of them may have a legal Settlement at Brood, tho' J. had not.

(41.)
To remove
his Wife and
Family, ill.
Ante, pl. 35.
Vide Far. 74.
Comb. 478.
Cases B. R.
553. S. C.

Christ's Hospital's Case. Trin. 11 W. III. B. R.

A Poor Child was left in Christ-Church Hospital; upon Complaint of the Wardens of the Hospital, two Justices made an Order on the Overseers of the Poor of the Parish, to receive and maintain the Child; but this Order was quashed, because it was not said, That the Parents were unknown, or likely to become chargeable to the Parish: For tho' a Child of three months old be helpless, yet the Parents are bound to provide for it. As to the principal Matter which was hinted, viz. That the Hospital was bound to provide for poor Children there exposed, the Court thought there was nothing in that.

(42.)
Poor Chil-
dren dropp'd
in Christ-
Church
Hospital.
Set. and Rem.
53. S. C.

inter The Inhabitants of St. Nicholas, Guilford in Surrey, and Killington in Suffex. Trin. 11 Will. III. B. R.

NORTHEY moved to quash an Order of two Justices to remove a Woman and her Bastard-Child from A. to B. whereas it appeared in the Order, that the Child was born at C. Holt C. J. The Bastard must be kept where 'tis born.

(43.)
Bastard set-
tled where
born.
Vide ante
427, 482.
Post 528, 531.
Holt 509. S. C.

Inter The Inhabitants of the Precinct of Bridewell and
The Parish of Clerkenwell. Hill. 11 Will. III. B. R.

(44.)

Carth. 515.

S. C.

Holt 575, 509.

Justices have

no Jurisdic-

tion to re-

move poor

Persons to or

from extra-

parochial

Places. But

note; In the

Case of the

Inhabitants

of Stokelane

and Dolting,

Hill. 11 Ann.

B. R. it was

adjudged by

Parker C. J.

and the whole Court,

that by Virtue of 13 & 14 Car. 2. cap. 12. sect. 21. the Justices

may exercise the Powers given by 43 El. and that Act, in all extraparochial Places, containing more

Houses than one, so as to come under the Denomination of a Vill or Township. Post pl. 48. Vid.

post 487, 501. 2 Lev. 142, 143. 4 Mod. 157, 158. 1 Mod. 251. 2 Mod. 237.

A Special Order of Sessions was, That H. was bound Apprentice, and served seven Years to a Hemp-dresser, within the Precincts of Bridewell, and afterwards he lived nine Years in Clerkenwell Parish, but gained no Settlement there: The Justices sent him to Bridewell as his last legal Settlement, by an Order, which set forth Bridewell to be an extraparochial Place. Et per Holt C. J. If a Place is extraparochial, and has not the Face of a Parish, the Justices have no Authority to send any Man thither; and so it was resolved in the Case of Sir John Osborn: Possibly a Place extraparochial may be taxed in Aid of a Parish, but a Parish shall not in Aid of that. This is *Causa omittus*. This Order was quashed.

Inter The Inhabitants of St. Michael Bedenham and
Kingston-Bowsey. Hill. 11 Will. III. B. R.

(45.)

Order of Re-

versal on Ap-

peal binds

not a third

Parish, not

Party.

Post pl. 58. &

pag 524, 527.

Ante pl. 11,

13, 20, 25.

Carth. 516.

S. C.

Ser. and Rem.

275.

H. Was sent by Order of two Justices from St. Michael Bedenham to Kingston-Bowsey, and that Order was reversed upon an Appeal to the Sessions: Then the Man went to Bedenham, and Bedenham sent him to D. and a Motion was made to quash this Order, because the Order of Reversal upon the Appeal as to Kingston-Bowsey, was conclusive against all the Parties. But the Court held, That the Determination upon the Appeal between other Parties, ought not to bind as to a third Parish which was no Party.

Anonymus. Hill. 11 Will. III. B. R.

(46.)

Special Order

ought not to

conclude to

the Opinion

of the Court.

AN Order of Sessions drawn up Specially, in Order to have the Opinion of the Court, was concluded; And if the Court should be of Opinion, then, &c. which was held naught for the Justices ought to determine one Way or other, and not make a special Conclusion, referring to the Court; but it was referred to the Judge of Assize.

Inter Inhabitan' Paroch' Eaton-Bridge *and* Inhabitan' Paroch' Weltram *in* Kanc'. Hill. 11 Will. III. B. R.

AN Order was made at the Quarter-Sessions for the Relief ^(47.) of poor Prisoners in Gaols, and providing Materials to set ^{Poor Prisoners.} them at Work, upon the Statutes 14 Eliz. c. 5. and 19 Car. 2. c. 4. whereby a Sum was assessed on the several Parishes, not exceeding what is allowed by both Acts; but the Order was quashed, because they ought to have made distinct Orders upon the different Statutes, the Toney to be levied by Virtue of each Statute being applicable to different Purposes.

Inter The Inhabitants of the Forest of Dean *and* The Parish of Linton. Trin. 12 Will. III. B. R.

H. Lived ten Years in the Forest of Dean, and then died, and ^(48.) left several Children: Two Justices made an Order to ^{Extraparochial Places.} move them to Linton in Herefordshire. Et per Holt C. J. If ^{Vide ante, pl. 44. Holt 575. S. C.} Place be a reputable Parish, and have Church-wardens and Overseers of the Poor, it is within 43 Eliz. tho' in Truth it be a Parish; but if it be merely extraparochial, as the Justices cannot send to such a Place, so they cannot send from it: As it is exempt from receiving, so it shall not have the Benefit of removing, for they have not proper Persons to complain. Persons in extraparochial Places must subsist on private Charity, as all Persons did at Common Law before 43 Eliz. which enacts, that every Parish shall keep their own Poor; in Consequence of which the Jurisdiction of Removals was first set up before the Statute 14 Car. 2. For unless the Poor were removed to their own Parishes, every Parish could not maintain their own Poor. But the Statute of 43 Eliz. does not extend to extraparochial Places. Gould J. started a Question, If the Justices of the County, where the Parish wherein he was last legally settled lies, might not make an Order upon the Parish to make a Rate for the Relief of this poor Man in the extraparochial Place; because not having gained a Settlement there, he remains an Inhabitant of that Parish still, else the Man may be starved for Want of Relief? Holt C. J. Quash this Order, and then go and get an Order: Forasmuch as H. was settled in the Parish of Linton, and not able to provide for himself; These are, &c.

Inter

Inter The Inhabitants of Chalbury and Chipping
Farrington. Trin. 12 Will. III. B. R.

(49.)
Parish, upon
whom an ori-
ginal Order
is made, can-
not remove
till that be
reversed.
Vide ante,
pl. 53.
Post, pl. 52.
Holt 509. S. C.

H. Was removed by Order of two Justices, from the Parish of A. in Warwickshire, to Chalbury in Oxfordshire; thence, by Order of two Justices, to Chipping-Farrington in Berkshire. It was objected, That Chalbury ought to have appealed, and got the Order upon them discharged, which Holt C. agreed; for sending the poor Man to another Place, is falsifying the first Order, which cannot be done but by Appeal; for Order of two Justices is a Determination of the Right against all Persons, till it be reversed: Chalbury should have appealed from the Warwickshire Order, and got that set aside, and sent the Man back thither, and the Justices there should have sent him to Chipping-Farrington; therefore naught.

Inter The Inhabitants of Ware and Stanstead-Mount
Fitchet. Trin. 12 Will. III. B. R.

(50.)

AN Order was made by two Justices, to remove H. with Wife and Children, from Ware in the County of Essex, Stanstead in the same County. Exception was taken to this by Mr. Eyre, 1st, Because it was, with Wife and Children. 2d Because it was said, It appears upon Examination before us, one of us, &c. and the Examination ought to be before both because both are to make the Judgment of Removal. Mr. Cooper would have distinguished this as the first Exception from Case of Mich. 10 Will. 3. ante Pl. . . . Of his Wife and Family because he might have Servants not removeable, but Children ought to follow their Parents. To the second he said, That 14 Car. 2. c. 12. the Complaint is directed to be made to one Justice, and in Consequence one Justice may examine; and it is only necessary that two should join in removing: Sed Cur' con in both. To the first Holt C. J. said, Suppose H. had put his Son out to Service at sixteen Years old at B. and according to the Statute he had served there a Year, and after the Father comes to B. himself, and the Son to live with him; such an Order would remove the Son, tho' he be not removeable. To the second, Gould J. said, the Statute directed, and the Practice to make Complaint to one Justice, and he grants his Wardship to bring the poor Man before two Justices, and then they examine and remove.

Examination
must be by
both Justices.
See 6 Mod.
180.
Farell. 54.
Ante, pl. 22.

Cominus Rex versus The Inhabitants of Long-Critchell.
Mich. 12 Will. III. B. R.

A Ban was removed from the Parish of Allhallows to the Parish of Long-Critchell. He goes from Long-Critchell to Execution. They got several Orders from two Justices, by Way of Execution. Cases B. R. 419. S. C. Holt 319. of the first Order, to remove him from P. to L. But all of them were quashed, because P. ought to have made an original Complaint, and upon that have got an Order, and not have rested on the Order of Removal from A. to L. tho' they might have used that as Evidence to induce the Justices to make such original Order; for P. is a third Parish, against which L. is not bound by the Order of Removal from A. to L. but may contest See 5 Mod. 321, 322. the Right of Settlement with them. Mr. Upton took an Exception. Ante 473, 480, 488. That the enforcing Orders did not appear to be made by two Justices, Quorum unus: And Holt C. J. seemed to think Ante 436. pl. 18. & Post, pl. 60. that a good Exception, because such Persons as cannot make an Order, cannot execute it: But the Orders were quashed upon the first Reason.

After The Inhabitants of Thackham and Findon in Sussex.
Hill. 12 Will. III. B. R.

A Poor Person was removed in 1694 from West Starring to Findon; Findon does not appeal. In 1700 the Ban comes to Thackham, and Thackham sends him by Order of two Justices to Findon; Findon appeals, and the Order was discharged. Two Justices Order not appealed from binds the Parish upon which it is made, till a new Settlement is gained. Vide ante, pl. 33 & 49. All three being now brought up by Certiorari, it was moved to quash the Order made upon Appeal, and urged that Findon was bound by the first Order from West-Starring to them, from which they never appealed, with respect to all the World, and are concluded to say, that the Place of his last legal Settlement was not with them: but in respect of the Distance of Time, the Court could not tell if he might have gained a new Settlement at Thackham, and if he might appear to the Justices, and they might have good Ground to discharge the Order of the two Justices. Then the Counsel offered to produce an Affidavit, That there was no new Settlement proved; but the Court held they could not examine that by Affidavit, nor inquire thereby into the Reason of making the Order. Ex motione Mr. Shelly.

Vide Post
491.
1 Salk. 67, 68.

(53.)
Order for
discharging
an Appren-
tice, the Ma-
ster not ap-
pearing.
Vid. Fares. 55.
1 Mod. 2.
5 Mod. 139,
140.

Ditton's Case. Pasch. 13 Will. III. B. R.

MOVED to quash an Order made for the Discharge of Apprentice: The Question arose upon the Clause of Statute, which directs, That upon the Appearance of the Master the Apprentice may be discharged by four Justices, after the Justice hath endeavoured to compose the Matter in Difference. In this Case it was objected, That Ditton the Master was bound to appear, and did not; and the Justices have but a limited Jurisdiction; and 'tis expressly directed by the Act, that this Discharge is to be made on the Appearance of the Master; besides there is another Remedy to proceed on the Recognizance, which is forfeited by not appearing.

Per Cur'. The Act must have a reasonable Construction, so not to permit the Master to take the Advantage of his own Stiffness; and it would be very hard, that supposing the Master profligate and runs away, the Apprentice shall never be discharged. Afterwards Exception was taken, because it appeared upon the Face of the Order, That Ditton was a Collar-maker, & not what the Trade is, nor that it is within the Statute; but in *Comfort's Case*, where one was bound to a Mantle-maker when there was no such Trade within the Statute, nor at the Time of the Statute: And in this Case it was said, That Justices might make the Master make Restitution of Part of the Money, and that it hath been so adjudged.

Ante 67.

1 Saund.
313, &c.
Post 491.
Skin. 108.

Inter The Inhabitants of Watford and Wendover
Pasch. 13 Will. III. B. R.

(54.)
Appeal from
Order of
Corporation-
Justices, must
be to the Ses-
sions of the
County, not
of the Cor-
poration.

TWO Justices of St. Albans made an Order, That where they were credibly informed, that Wendover was the Place of H.'s last legal Settlement, but no where adjudged it to be from this Order there was an Appeal to the Quarter-Sessions of St. Albans, where it was confirmed; and both were quashed the first, because there was no Adjudication of what was the Place of his last legal Settlement; and the second, because Appeal ought to have been to the Sessions of the County, not the Corporation; and as it was, 'twas coram non judice.

inter The Inhabitants of Suddlecomb and Burwash.
Trin. 13 Will. III. B. R.

EXCEPTION was taken to an Order of two Justices, because it was only said to be complained by the Church-wardens, that Person removed was likely to become chargeable, but not adjudged so by the Justices. Holt C. J. said, That the Justices not remove a Man, unless he be likely to become chargeable, otherwise they might remove a Man of an Estate; and he is a Diversity, that where the Order is, Whereas it appears us, &c. on the Complaint, &c. that J. S. is likely to become chargeable to the Parish, that will be well enough; but where it is as here, Whereas Complaint has been made, &c. that is ill: it was agreed to be referred to the Judge of Assize. Postea, 2 Ann. B. R. The Case of the Inhabitants of Darnall in Shire, the same Resolution. Postea, Pasch. 2 Ann. B. R. the Resolution. It ought to appear, that the Person removed, Person removeable, and there ought to be a particular Averment, That he is likely to become chargeable.

(55.)
Complaint
that H. is
likely to be
chargeable,
not enough
without Ad-
judication;
but, Whereas
it appears to
us, on Com-
plaint, &c.
that H. is
likely, &c. is
sufficient.
Ante 473,
478, 479.
Post 530.
1 Sid. 99.
1 Lev. 84.
Raym. 65.
1 Show. 76.
3 Mod. 270.
5 Mod. 357.
S. C. 6 Mod.
163, 164.
Holt 576.

minus Rex *versus* Johnson. Trin. 13 Will. III. B. R.

THE Justices of Peace at Newcastle in Northumberland, discharged an Apprentice by an original Order made at the Sessions, without any previous Application to a Justice of the Peace, to endeavour to compromise the Matter as the Statute directs; and after several Debates it was adjudged, That if this had been a new Thing, the Court would have thought a previous Application to a Justice necessary; but there having been so many original Orders made at Sessions, brought into this Court and affirmed here, 'twas too late to call this Matter in question; the Order was confirmed.

(56.)
Sessions may
make origi-
nal Order to
discharge
Apprentice.
See 1 Salk.
67, 68. S. C.
1 Mod. 2,
287.
1 Saund. 314.
316.
1 Vent. 174,
175.

Minchamp's Case. Trin. 13 Will. III. B. R.

E being a Merchant at Mile-End, two Justices bound a poor Girl Apprentice to him; he appealed to the Sessions, the Order was discharged; because they thought it unfit to compel a Merchant to take an Apprentice; and now this Court on Consideration of the Matter, confirmed the Order of Sessions; because the late Act having made Persons compellable to Apprentices, and given an Appeal to the Sessions, it was in Discretion of the Justices at Sessions to determine, *the*
Vol. II. M

(57.)
Justices at
Sessions are
proper
Judges, whe-
ther fit to
oblige H. to
take Appren-
tice, or not.
Vide 6 Mod.
163, 164.
1 Salk. 66,
68, 381.

6 Mod. 164. ther it was or was not fitting to put an Apprentice upon any one
 1 Show. 76. and therefore the Court would not disturb what the Sessions had
 3 Mod. 270. done, but confirmed the Order.
 Raym. 65.
 1 Lev. 84.
 5 Mod. 139,
 140.
 1 Saund. 314,

Inter The Parishes of Swanscomb and Shensfield. Pasch
 316. I Ann. B. R.

(58.)
 Order rever-
 sed is final
 only between
 the Parties :
 Order con-
 firmed or not
 appealed
 from, is final
 as to all the
 World.
 Ante pl. 45.
 1 Vent. 310.
 5 Mod. 417.
 6 Mod. 269,
 287.

A Poor Man was sent by two Justices to Shensfield, and
 on an Appeal the Order was confirmed; afterwards Shen-
 field sends him by an Order to Swanscomb: All these Orders be-
 ing brought up by Certiorari, the Order to send him to Swanscomb
 was quashed, because by the Determination of the Justices in
 firmance of the Order on the Appeal, Shensfield was estopp-
 ed against all the World to say, That was not the Place of his last
 legal Settlement; for the Justices cannot remove, but to the
 Place of the last legal Settlement; and shewing any later Place
 of Settlement will discharge the Order on the Appeal; and the
 Diversity is between an Order discharged and an Order confir-
 med upon Appeal, or not appealed from. In the first Case, the
 Matter is at large as to all Places, but the Place to which the
 poor Man was sent, which, upon the Appeal, was determined
 not to be the Place of his last legal Settlement. But in the
 later Cases, the Place to which he was sent, is bound, and the
 Order final and conclusive as to all the World.

Inter The Inhabitants of Weston-Rivers and St. Peter
 in Marlborough.

S. C. 5 Mod.
 149. call'd
 Rex ver. In-
 hab. of Woot-
 ton-Rivers.
 (59.)
 It is not ne-
 cessary to
 shew in the
 Order, that
 the Person
 did not rent
 a Tenement
 of 10 l. per
 Annum.
 Vide ante
 491.
 Post 524, 536.
 Farell. 54.
 Mod. Cases
 88.
 S. C. Carth.
 365.
 Holt 510.
 3 Salk. 254.
 Ser. and Rem.
 18, 165.
 Cases B. R.
 89.

UPON an Order of two Justices, it was objected, 1st, That
 it was not said that the Woman was poor, &c. but
 and like to become poor. 2dly, That it was not said she did
 offer Security. 3dly, That it was said to be upon Complaint
 only, and not of the Church-wardens, &c. 4thly, it was
 said she rented not a Tenement of 10 l. per Annum. The
 last were the Objections chiefly insisted upon; and the Court was
 clear as to the first of these two, viz. That it must be upon Com-
 plaint of the Church-wardens, &c. and so appear; but in
 reading the Return, another Question arose; for the Return
 set forth at large, That upon Complaint of the Church-wardens
 Overseers of the Poor concerning A. to the Justices; they the
 Justices, one of the Quorum, made the following Order, in
 verba. Forasmuch as Complaint hath been made to us,
 so that it was urged, That the Defect of the Order was supplied
 by the Return of the Certiorari: As to the last of the four
 objections, Holt C. J. said, That before 13 Car. 2. two Justices
 removed

removed by Consequence of Law, upon 43 Eliz. because that Statute makes a Provision, That every Parish shall maintain its own Poor; therefore the Justices considered who were properly the Poor of a Parish, and they were held to be such as were there settled a convenient Time, which was thought a Month, so that a Month's Abode made an Inhabitant. Still there remained several Doubts, which occasioned 13 & 14 Car. 2. c. 12. upon which Statute the present Question arises, viz. Whether the Power to remove be not founded on 13 & 14 Car. 2. but on the Law, as it was before? And since such an Order would serve to remove before, why will it not serve now, since the Statute? Or whether 13 & 14 Car. 2. obliges the Justices to alter the Form of their Order: And this depends upon this Part of the Statute, viz. Whether it be by Way of giving Jurisdiction or Restriction: At another Day Holt C. J. pronounced Judgment; As to the Exception to the not averring that he did not rent a Tenement of 10 l. per Annum, he said, the Secondary had searched the Precedents, and they are without this Clause, according to the Form of the Orders before 14 Car. 2. And this Order therefore is well enough; and if the Party rents a Tenement of 10 l. per Annum, he may appeal to the Sessions: As to the other Exception, it is fatal, for no one can disturb a Man coming into a Parish, but they that have Authority to do it: A Complaint, ex Officio, from one not concerned, is nothing, it may be the Parish are willing to keep him; and as to the Return, that cannot cure the Order, for they had exercised their Authority before; and by the Certiorari they have no Power but to return the Order in hæc verba; and therefore what they think fit to return farther, the Court can take no Notice of.

Defect of an Order not made good by Matter alledged in the Return.

On Certiorari Justices can only return the Order in hæc verba. Vide 1 Salk. 147.

Inter The Inhabitants of St. George's and St. Olave's Southwark.

TWO Orders were returned, the first for settling a poor Man, one Thomas Gill, and the second a Confirmation of the first, upon an Appeal to the Quarter-Sessions: The first Order recited, That whereas Complaint hath been made to us, &c. that T. G. had of late intruded into the Parish of St. George's, We judge him to be last legally settled at St. Olave's: These are therefore to require you to convey the said Tho. Gill, to the Parish of St. Olave's; and the Direction upon the Order was, To the Church-wardens and Overseers of the Poor of the Parish of St. Olave's; Quashed. For they ought, and can only Order the Parish-Officers where the Intrusion is made, to make the Removal.

(60.) Justice cannot command the Officers of the Parish whether H. is sent to remove him. Vide ante 436 pl. 18. & 489. pl. 51.

Inter The Parishes of St. Andrew's Holborn and St. Clement's Danes. Mich. 3 Ann. B. R.

(61.)
Sessions being but one Day in Law, may alter their Judgment and make a new Order; but must certify the latter only.
Vide 6 Mod. 287.
Post 605, 606.
5 Mod. 356.
S. C. Post 606.
Sett. and Rem. 168.
Holt 511.

THE Court of Quarter-Sessions of Middlesex made an Order, and afterwards the same Sessions vacated it by subsequent Order, and a Certiorari being brought, both Orders were returned thereon. Et per Holt C. J. You should not have returned the vacated Order, but only the latter. This is as we disliking our Judgment, should the same Term make an Entry of two different Judgments, and return both upon a Writ of Error, which ought not to be: The Sessions is all one Day and the Justices may alter their Judgment at any Time, while it continues: Thus, at the Old Baily, you see Judgment de Pauper & dure given; and yet, if the Party will plead, we will set aside that Judgment, and admit him to plead.

O U T L A W R Y.

1 Show. 80, 309.
2 Show. 60, 68.
Rex & Regina *versus* Tippin---- 1 W. & M. B. R.

(1.)
H. outlawed for Misdemeanor, cannot be thereon fined for the Fact.
See 1 Lev. 33, 34.
2 Lev. 49.
Raym. 17.
2 Chan. Caf. 44

ONE was outlawed upon an Information for seducing a young Gentleman to marry a young Woman of lewd Character, and fined 5000l. And it was moved in behalf of the Defendant, that he could not be fined upon the Outlawry, because in Misdemeanor the Outlawry does not enure as a Conviction for the Offence, as it does in Cases of Treason and Felony; but as a Conviction of the Contempt for not answering, which Contempt is punished by the Forfeiture of his Goods and Chattels; and if he might be fined now, he must be fined again upon the principal Judgment. And the fine was held to be irregular, for the Outlawry in these Cases is not a Conviction, as appears by Fleta 42. Quamvis quis pro contumacia & fuga utlagetur, non propter hoc convictus est de facto principali.

Attorney General *versus* Baden. Mich. 5 W. & M.

ADWES Honey to B. on a Judgment, and to C. on a Bond; (2)
A. is outlawed at the Suit of the Obligee, and his Lands Vid. Ray. 17.
seized on the Outlawry; and the Question was, Whether the Co- 1 Lev. 33, 34.
nusee of the Judgment could extend these Lands? And it was 2 Lev. 49.
held the Outlawry should be preferred, and that the King's Hands
should not be amoved, unless the Conusee could shew Covin and
Fraud between the Obligor and Obligee.

Adlame *versus* Colebatch. Pasch. 8 Will. III. C. B.

IT WAS moved in C. B. that the Plaintiff might reverse an (3)
Outlawry at his own Charge, upon Affidavit, That the Where the
Defendant was actually in the Fleet in Execution for the Plaintiff shall
in another Suit, and he knew it; and it was granted, because reverse it at
the Plaintiff should have brought him to the Bar by Habeas Cor- his own
pus, and there have charged him with a new Declaration. Charge.
2 Vent. 46.

Lee *versus* Millard. Mich. 8 Will. III. C. B.

A LIKE Motion was made upon Affidavit, That the Defendant (4)
lived publickly, and was denied. Et per Powel J. Such Mo-
tions are frequently granted in B. R. because 'tis a great Charge
to reverse an Outlawry there; for the Defendant must appear in
Person, but here he needs not, and the Charge is but 16s. 8d.
not so much as a Bailiff's Fees for an Arrest. We have always
denied this Motion of late. 2 Ven. 46.

c. 18. Vide Post pl. 6. See 2 Lev. 464. Cro. El. 170, 373.

Arthur's Case. Hill. 8 Will. III. B. R.

ARTHUR was outlawed for Felony upon five Indiaments, (5)
and afterwards came in, and was brought to the Bar, and
asked what he had to say, why Judgment should not be given?
He produced five Writs of Error. Et per Holt C. J. If there be
no Lands, the Attorney General may confess Error, and then he
shall plead presently, and be tried upon the Indiaments. If there
be Lands, there must be a Scire facias against the Lords, mediate
and immediate, to shew Cause why he should not have Restitution.
But if it be suggested on the Roll that he has no Lands, and the
Attorney General confesses it, there needs no Scire facias.

Error to re-
verse Out-
lawry for Fe-
lony; if there
be Lands
there must go
a Scire Faci-
as; but if At-
torney Ge-
neral confess
on Record
that there are
none, no Sci-
re facias is
necessary.
S. C. Holt
518.

Ano-

Anonymus. Mich. 10 Will. III. B. R.

(6.)
Défendant
need not ap-
pear in Per-
son to reverse
Outlawry,
except in
Treason or
Felony.
Vide ante
Pl. 4.

H Was outlawed in two Actions, one was 10 l. the other 40 s. and upon reversing the Outlawry, the Court to Special Bail for the first, and an Appearance for the other, upon 4 & 5 W. & M. c. 18. Note; The Recognizance was taken pursuant to 31 Eliz. c. 3. Note; Now per 4 & 5 W. & M. one outlawed, except for Treason or Felony, need not appear in Person to reverse an Outlawry, but by Attorney.

Symmons *versus* Bingoe and Cook. Pasch. 4 Ann. B.

(7.)
If two are
outlawed,
Error to re-
verse must be
brought in
the Name of
both, but one
may be sum-
moned and
severed.
Cro. El.
270, 278.

THE Defendant Bingoe being a Feme, and waived up Process of Outlawry, 'twas now moved on her Behalf that upon filing common Bail, she might have Liberty to reverse the Outlawry. Per Cur', The Writ of Error to reverse the Outlawry, must be brought in the Name of both the Parties that are outlawed; and if one only appears, the other may be summoned and severed, and then the Outlawry may be reversed for the Benefit of him who appears only. Before it can be reversed for want of Proclamations, the Party outlawed must give Bail to appear and to answer in another Action.

If H. comes
in gratis, he
may reverse
without
Bail; other-
wise if by
Cepi Corpus.
Cro. El. 707.

If the Party outlawed comes in gratis upon the Return of an Exigent, Alias or Pluries, he may be admitted by Motion, to reverse the Outlawry, for any other Cause, but want of Proclamations, without putting in Bail. If he comes in by Cepi Corpus, then he shall not be admitted to reverse the Outlawry, without appearing in Person, as in such Case he was obliged to do at Common Law; or putting in Bail with the Sheriff for Appearance upon the Return of the Cepi Corpus, and for doing what the Court shall order. Appearing by Attorney is an Indulgence by 4 & 5 W. & M. and the Bail is to be special or common in this, as in other Cases.

Of Pleading Outlawries in Bar or Abatement, Vide Cro. Car. 50. 3 Lev. 29. 1 Show. 8. And how to plead an Outlawry before after Judgment, see 1 Lutw. 110, 111. And how to plead it in the same Court, and how in another, 1 Lutw. 40. 2 Lev. 50.

Oyer and Shewing of Deeds, Writs, &c.

Vide post
658, 701.
Lutw. 1643.
2 Lev. 142.
1 Saund.
Hob. 217.
Farell. 9, &
38.
6 Mod. 28.

Salisbury versus Williams. Mich. 4 W. & M. B. R.

IN Debt on a Bond in the Grand Sessions of Wales, the Plaintiff omitted in his Declaration to make a Profert, &c. Judgment was for the Plaintiff; and now in Error this Omission was insisted on, and the Court held it only Mat-
ter of Form, of which no Advantage could be taken after Verdict, on a general Demurrer, and therefore affirmed the Judgment.
Id. 249. Cro. Car. 190. Cro. El. 153, 217. 16 & 17 Car. 2. cap. 8.

(1.)
Want of Pro-
fert, only
Form.
Vide Stat. 4,
5 Anne c. 16.

Morris's Case. Trin. 7 Will. III. B. R.

IN Replevin, the Defendant avowed for a Rent-Charge, and made Title by a Will, and pleaded it with a Profert, and the Plaintiff insisted to have Oyer, alledging it was the Avowant's folly to make a Profert of it, and he ought to take Advantage of it. Et per Cur', he was not bound to plead it so; it is but Sur-
mulage, and we will not compel him to give Oyer of it.

(2.)
Upon Profert
made unne-
cessarily,
Oyer shall
not be given.
Vid 6 Mo. 28.
3 Lev. 30.

Roberts versus Arthur. Mich. 13 Will. III. B. R.

UPON the Profert of a Deed it remains in Court all that Term, but no longer, unless it be controverted; but Let-
ters testamentary, or of Administration, do not remain in Court; the Party may have Occasion to produce them elsewhere. Vide
6 H. 6. 30. Per Cur'.
Where the Letters Patent pleaded, are recorded in the same Court where the Plea is pleaded, the Party need not shew them; but where in another Court, he must plead them with a Profert in Cur', or the Exemplification of them under the Great Seal. Per
Holt C. J.
must be shewn, and where not. Mod. Cases 233. 5 Co. 76. 2 Lev. 142. Farell. 9, 38.
Lutw. 1644.

(3.)
Deed re-
mains in
Court all the
Term it is
produc'd;
otherwise of
Letters testa-
mentary or
of Admini-
stration.
S. C. Cases
B. R. 598.
Holt 421.
Where Pa-

S. C. 6 Mod.
27, 28.
Holt 518.

Longavil *versus* The Hundred of Isleworth.
Mich. 2 Ann. B. R.

(4.)
Denial of
Oyer where
it ought to
be granted, is
Error, o-
therwise of
granting it,
where it
ought not.
6 Mo. 28, 292.

IN Debt against the Hundred of Isleworth; the Defendant pleaded in Abatement, Caption del Robbers, &c. the Plaintiff replied Nul Caption, &c. upon which it was demurred, and a Respondeas ouster awarded, and now all being the same Term, the Defendant craved Oyer of the Writ, and that being set forth pleaded the General Issue. Et per Holt C. J. To deny Oyer where it ought to be granted, is Error, but not eontra: Therefore we ought either to grant, or to enter the Denial upon Record that they may assign it for Error. If the Plaintiff will contend it, he may strike out the rest of the Pleading, and demur, in Order to obstruct the Oyer: And at another Day it was ruled, that the Defendant could not have Oyer, because he had already pleaded in Abatement, and having of Oyer is never to enable the Party to plead in Bar, but to plead to the Writ, which is done already, and therefore pass.

S. C. 6 Mod.
244.
Holt 212.
1 Salk. 76,
ante 425.

Armit *versus* Bream. Mich. 3 Ann. B. R.

(5.)
Where H. is
bound to
make a Deed,
he must set
it forth.

WHERE a Man has obliged himself to make a Deed, and is sued for not doing it; it is not enough to say, that he made the Deed, viz. Lease, Bond, &c. but he must set it forth That the Court may judge of it's Sufficiency; for it ought to be a good Deed; but if it be to deliver, or shew, or produce Deed, that is, a Deed already made, there it is enough to say that he delivered, or shewed, or produced it. Per Holt C. J.

S. C. 6 Mod.
237.

Cook *versus* Remmington. Mich. 3 Ann. B. R.

(6.)
Defendant
demands
Oyer of an
Indenture,
which he
ought to set
forth himself,
and the Plain-
tiff gives Oyer,
but imperfect,
it is at the Defen-
dant's Peril.
See 3 Lev. 50.
1 Saund. 3.
1 Sid. 50,
97, 495.
1 Mod. 266.

IN Debt upon a Bond, the Defendant demanded Oyer of the Condition, which was, to perform Covenants in an Indenture, and then demanded Oyer of the Indenture; and the Plaintiff gave it him, omitting an Indorsement, which was made before the Execution of the Deed; upon this Oyer the Defendant pleaded Performance; the Plaintiff replied and set forth the Indorsement and prayed Judgment for the Variance. Et per Cur' 1st, The Defendant should have set forth the Indenture himself, being Party to it, and should have pleaded Performance to all the Covenants therein. 2dly, The Plaintiff was not obliged to give Oyer of the Indenture, and tho' he did, yet being what he need not do, the setting it forth is not at his Peril, as where he is obliged

obliged to set it forth; nor is he concluded to say, That there is more contained in the Indenture, but at Liberty, as well as if the Defendant himself had set it forth; and the Court held, That as the Defendant was bound to set it forth, so he was bound to supply this Omission, and make his Plea compleat; and for this Judgment was given for the Plaintiff.

1 Vent. 37.
1 Saund. 9,
122.
Cro. Jac. 360.
1 Keb. 104.
Keilwey 71.

Pardon General and Special.

Vide Lutw.
1009.
Cro. El. 464.
5 Co. 49, 50.
Hutt. 21.

1 Show. 284. 2 Show. 334. 2 Hawk. P. C. cap. 37.

Dominus Rex *versus* Parsons. Hill. 3 W. & M. B. R.

PARSONS was indicted, convicted, and attainted for the Murder of Mr. Wade, and pleaded their Majesties Pardon; and Note, it was for Murder by express Words, without any Non obstante, the Non obstante being taken away by the Statute of W. & M. And Holt C. J. asked for the Writ of Allowance, which should certify he had found Surety of the Peace within eight Months after the Pardon; whereupon the Writ of Allowance was read: And Holt C. J. said, That the Court ought not to allow the Pardon till thus certified, and that this was a Condition precedent, by the Statute of Edw. 3. and Winnington moved, that the Pardon ought not to be allowed; arguing, That the Crime could not be pardoned: But Holt C. J. said, There was as good Reason why the King should pardon an Indictment of Murder, which is his Suit, as why a Subject should discharge an Appeal, which is the Suit of the Subject; and that the King was, by his Coronation-Oath, to shew Mercy as well as to do Justice. He said, the Statute of 2 Ed. 3. c. 3. meant only, that the King should be fully informed, before he pardoned any Felony; and that the Reason of that, and other restrictive Statutes, was for that after the Statute of Gloucester, upon a Murder done, it was usual to apply to the Lord Chancellor, and gain a Pardon by undue Means and false Suggestions, with general Words in it; and this was the Occasion of those restrictive Statutes, that Application should be made to the King in Person, to the Intent the King himself might be apprized

(1.)
Pardon for Murder not to be allow'd without Writ of Allowance, certifying Sureties taken for the Peace.
See 1 Saund. 362.
1 Lev. 25, 26, 120.
3 Lev. 136, 332.
Raym. 13, 370, 477.
Faref. 153.
1 Show. 283.
S. C.
Holt 519.

King may pardon Murder by express Words.
March 213,
217.
Raym. 13,
477.
1 Show. 28.

500 Palatine Counties of Chester, Durham, &c

prized of the Matter. By 13 R. 2. c. 2. great Difficulties are put upon those that shall be Suits for a Pardon of Murder, they are to incur a Penalty, &c. but this was found grievous to the Subject, and therefore was repealed by 16 R. 2. c. 26. which shews the Necessity there is, that the King should have a Power to pardon; upon which the Pardon was allowed.

Foxworthy's Case. Hill. 1 Ann. B. R.

(2.)
One pardon-
ed shall not
be charged
in Custody
with Civil
Actions.
Quer.
Raym. 370.
5 Co. 50.
Far. 153. S.C.
Holt 521.

FOxworthy pleaded his Pardon, and there was a Mistake in the Proceedings: At another Day he came, and having the Fault amended, it was allowed. His Creditors now move that they might have Leave to charge him with Actions, as Custodia, but were not permitted to do it: For per Holt C. That might defeat the Queen's Pardon, by rendering him incapable of performing the Condition, which is, to go beyond Seas, &c. and this is not unreasonable; for without the Pardon the Attainder had continued, and he must have been hanged; and there is no Reason why the Pardon should put the Creditors on a better Condition than otherwise they would have been, to the Prejudice of the Party; for the Pardon was given for his Benefit, and not for the Benefit of his Creditors.

Vide ante
452.
2 Lev. 111,
223.
1 Chan. Caf.
41.

Palatine Counties of Chester, Durham, &c.

Willbraham *versus* Poley. Trin. 12 Will. III. B.

Error to the
County Pa-
latine of
Chester.

MR. Acherley moved the Court to stay the Return of a Writ of Error out of Chancery, to reverse an Outlawry in the County Palatine of Chester, according to the Opinion of my Lord Coke, 4 Inst. 214. q. vide: Sed non allocatur; for this old Usage is gone by 32 H. 8. c. 43. and 33 H. 8. c. 13. There were no Outlawries in Chester.

before 33 H. 8. c. 13. for Coroners are there introduced by that Statute; and there was no Chief Justice in Chester till Q. Elizabeth's Time, for till then there being but one, there could be no Chief. Vide the Account of this Custom at large in Dyer 345, 320, 321.

Parish, Town, Vill, &c.

Vide 1 Mod.
251.
2 Mod. 237.
Ante 486.
11 Co. 25. b.
Co.Lit. 125. b.

Rudd *versus* Morton. Mich. 4 Will. & M. B. R.

UPON a Trial at Bar in Replevin, wherein the Defendant avowed as Overseer of the Poor, the Question was, Whether Stratton was a reputed Parish of it self, or Part of the Parish of Biggleswade in Bedfordshire? (1.) Evidence of a reputed Parish within 43 Eliz. Vid. Cro. Car. 92, 384, 396. 4 Mod. 157, 158. call'd Rudd *versus* Foster. Post 572. Raym. 67. Et per Cur'; To make Stratton a reputed Parish, within 43 Eliz. it must have a parochial Chapel, and Chapel-wardens and Sacraments, at the Time the Statute was made; and because the pretended Parish of Stratton had but one Chapel-warden, whose Office it was to collect the Rates taxed upon Stratton, and pay them to Biggleswade, they were held Part of the Parish of Biggleswade, and not a reputed Parish within 43 Eliz. and their having a distinct Overseer, and maintaining their own Poor, was not thought sufficient to make them a distinct Parish.

A Parish shall be intended a Vill, prima facie; adjudged Mich. Vill, quid. 6 W. 3. Wilton *versus* Laws. Vide 1 Inst. 115. b. 1 Lev. 78. See Hob. 296. If a Place be named generally, that Place shall be taken to be and intended a Vill; adjudged Mich. 10 W. 3. B. R. Vinkeston *versus* Ebden.

Dominus Rex *versus* Bernard. Mich. 8 Will. III. B. R.

(2.)
Regularly a
Constable is
to be chosen
in the Leet or
Turn; may
be in a Cor-
poration by
Custom.

See 1 Salk.
173, 380.
1 Mod. 13.
Aley 78.

1 Rol. Abr. 535. pl. 1, 2. 541. pl. 5. 1 Bull. 174, 176. 5 Mod. 124, 127. Skin. 669. S. C. Comb. 416.
Holt 152. Ser. and Rem. 214. Cases B. R. 115.

Indictment, for that he being chosen Constable in a Corporation, according to Custom debito modo, refused to take upon him the Office; and upon Demurrer it was said, per Holt C. J. That at Common Law all Constables were chosen at the Leet: Where there is no Leet, at the Turn: Whether by the Steward or the Homage, has been a great Question: But without Question, a Corporation, of common Right, cannot chuse a Constable: By Custom they may, as having the Government of the Place reposed in them; but then they must prescribe for it.

See 1 Chan.
Cas. 205, 221.
& post 509.

P A R L I A M E N T.

Far. 13. S. C.

Prideaux *versus* Morris. Trin. 2 Ann. B. R.

(1.)
No Action
lies at Com-
mon Law a-
gainst an Offi-
cer for a false
Return of
Members to
Parliament,
unless where
the Right is
determined,
or cannot be
determined
in Parlia-
ment.

See 6 Mod.
45, 49.

1 Salk. 19, 20.

5 Mod. 311.

Pollexf. 470.

3 Lev. 29, 30.

Lutw. 88.

2 Sid. 168.

2 Lev. 50, 86, 114, 250. 2 Vent. 50. 1 Vent. 206. 6 Mod. 100. 1 Lutw. 82. N. L. 31. Holt

523. 8 S. T. 9.

IN an Action on the Case for a false Return of Parliament-men, against the Sheriff, the Plaintiff declared, That whereas he was duly elected, the Sheriff returned A. B. to be duly elected, who was, in Fact, not duly elected. Mr. King objected, That the Right of Election was only to be determined in the House of Commons; for that it was a Parliamentary Matter, which ought not to be tried here, no more than the Right of Precedence. Mr. Eyre contra, That this Court may determine what is an Act of Parliament, 8 Co. 1. their Privileges, Mo. 67. 1 Ro. 903. Dyer 275. the Right of Peerage: And here the Right of Election is no otherwise in Question, than as it is incident to the Falsity. Holt C. J. The Cause of the Plaintiff's Suit is a Wrong done out of Parliament, and whatever falls under the Regulation of Law, and is done out of the Houses of Parliament, is subject to the Law of the Land, for Laws are to be executed out of Parliament; but as for the Rules of the House,

as Sitting, Meeting, &c. they are within the House, and the Judges cannot know them, there being no Practice of them out of Parliament: But if the Parliament should make a Law concerning them, or they should become necessary to be determined on the Account of some other Matter cognizable by the Judges, the Judges must take Notice and determine them, as in Bynion's Case.

And Holt C. J. seemed to be of Opinion, 1st, That for a double Return no Action lay against the Sheriff before the Statute of 7 & 8 W. 3. c. 7. not only because 'tis the only Method the Sheriff has to indemnify himself; but when the Right comes to be determined in Parliament, one Indenture returned is taken off the file, and then there is no double Return. 2dly, He seemed to think, that for a false Return the Party could have no Action, where there might be a Determination in the House of Commons, because of the Inconvenience of contrary Resolutions; and so if a Suit be between A. and B. A. is voted elected, B. cannot bring an Action, and say, that he was duly elected and returned, because his Name does not appear upon Record; and he is estopped to say, that A. was not duly elected and returned; but where the Right of Election either is determined, or cannot be determined in Parliament, as in Case of a Dissolution, an Action lies for the false Return, for the Courts at Law can neither anticipate nor contradict their Judgment. Upon a Writ of Error of Judgment in C. B. for the Defendant.

Mod. Cases 48.
King's Courts may judge of Parliamentary Matters incident.
See 6 Mod. 45, 49.
2 Vent. 25.
Pollexf. 470.
2 Keb. 356, 433, 435, 664.
Lutw. 88, 89.
Hob. 43.
1 Cro. 142, 535.
1 Jo. 194.

Domina Regina *versus* Paty & al'. Hill. 3 Ann. B. R. 5 Mod. 311, 312.

THE Defendants having been committed to Newgate by the House of Commons, were now brought into Court by several Writs of Habeas Corpus; and the Cause of their Commitment was returned to be a Warrant signed Robert Harley, Speaker, requiring the Keeper of Newgate to take into his Custody the several Persons, Defendants, for having commenced and prosecuted an Action at Law against the Constables of Aylesbury, for refusing their Votes in the Election of Members of Parliament, in Contempt of the Jurisdiction and open Breach of the known Privileges of the House of Commons. Mr. Lechmere, Page, Mountague and Denton, who were of Counsel for the Prisoners, prayed that they might be discharged for several Reasons. 1st, Because the Warrant was not under Seal, as it ought to be. 2dly, Because the Commitment was to remain during Pleasure. 3dly, Because they had done no unlawful Act; for the Prosecution of a Suit is lawful, and no Breach of the Privilege of that House. But Powell, Powys and Gould, Justices, held, 1st, That the Commitment was well enough in Form; because it

(2.)
On Commitments by the House of Commons for Privilege, no Court can deliver on a Habeas Corpus: Held by three Judges against Holt C. J.
See 1 Salk. 19, 20.
6 Mod. 45.
1 Mod. 145.
2 Lev. 114, 250. & ante 502.
2 Show. 84.
Pollexf. 470.
Fares. 13.
6 Mod. 49.
Holt 526. S.C.

3 Keb. 365,
589, 664.

Filing and
continuing
Original, no
Breach of
Privilege.

Authority of
Commons
circum-
scrib'd by
Law.
Post 512.

Writ of Er-
ror is of
Right in all
Cases, except
Treason and
Felony.
See 2 Show.
85, 98.
6 Mod. 130.

it was according to the usual Manner of Commitments by the House. 2dly, That the House of Commons were the proper Judges of their own Privileges; and this Court was now estopped to say, That this was not a Breach of the Privileges of the House of Commons, or that the House of Commons had no such Privilege. Holt C. J. contra said, That this was no Breach of Privilege of the House of Commons; that the commencement and Prosecution of an Action did not necessarily imply a going farther than the bare filing and continuing of an Original, which is no Breach of Privilege: He said, the Suing was no Breach of Privilege, nor can their Judgment make it so, nor conclude this Court from determining contrary; when the House of Commons exceed their legal Bounds and Authority, their Acts are wrongful, and cannot be justified, more than the Acts of private Men: That there was no Question but their Authority was from the Law, and as it is circumscribed, so it may be exceeded. To say, they are Judges of their own Privileges and their own Authority, and no Body else, is to make their Privileges to be as they would have them: If there be a wrongful Imprisonment by the House of Commons, what Court shall deliver the Party? Shall we say, there is no Redress, and that we are not able to execute those Laws, upon which the Liberty of the Queen's People subsists? To conclude, All Courts are so far Judges of their own Privileges, and intrusted with a Power to vindicate themselves, that they may punish for Contempts; but to make them, or any Court, final Judges of them, exclusive of every Body else, is to introduce a State of Confusion, by making every Man Judge in his own Cause, and subverting the Measures of all Jurisdictions.

And now a new Question was started and referred to the Judges, Whether the Queen ought to allow a Writ of Error in this or any other Case, ex debito Justitiæ, or ex mera gratia. And ten of the Judges were of Opinion, That the Queen could not deny the Writ of Error; but it was grantable ex debito Justitiæ, except only in Treason or Felony. Vide 2 Lev. Thurston's Case. Price and Smith held, That the Subject could not demand them in any criminal Case: Then it was a Doubt Whether any Writ of Error lay upon a Judgment given on Habeas Corpus?

Coundell *versus* John. Hill. 5 Ann. B. R.

(3.)
Action lies,
not for a false
Return, but
upon the Sta-
tute 7 & 8
W. 3.

IN Case; the Plaintiff declared that he was elected Member of Parliament for such a Borough, pursuant to the Queen's Writ, &c. and that the Defendant returned two other Persons to be elected; and that he the Plaintiff petitioned the House, and was adjudged by them

them to be duly elected, and his Name ordered to be inserted in the Return, and the Name of the other to be rased. After Verdict, on Not guilty, the Defendant moved in Arrest of Judgment, that here is no Cause of Action; for it appears now, the Plaintiff has had the Effect of his Election; he is returned; he has his Place; there is nothing wanting wherein he can pretend himself injured, but the Costs he has been at in the Prosecution; and as to them, it ought to be supposed, that the House considered of them. This was endeavoured to be made good upon the Statute 7 & 8 W. 3. But Sir Tho. Parker, for the Defendant, answered, That this Declaration cannot be taken to be founded upon that Statute, because the Fact was laid not agreeable to it, nor was it such an Action as was intended by the Statute, which differs from a general Action; for first, an Action grounded upon a general Prohibition of a Statute, ought not to be for the Party only, but the Queen and Party tam quam; for a Fine is due to the Queen for the Breach of the Statute, as well as Satisfaction to the Party injured. Et per Cur, Where a Statute introduces a new Law, by giving an Action where there was none before, or by giving a new Action in an old Case, the Plaintiff need not conclude contra formam Statuti. But if a Statute gives the same Action, with a Difference of some Circumstances, as double Damages, &c. the Plaintiff must either conclude, contra formam Statuti, or make his Case so particularly within the Statute, that it may appear to be so; and because he had not done it in this Case, Judgment was given for the Defendant.

See 6 Mod.
45, 49.
1 Salk. 19, 20.
3 Mod. 311.
Farell. 13.
Pollexf. 470.
3 Lev. 29, 30.
Lutw. 88.
2 Sid. 168.
2 Lev. 50, 86.
114, 250.
3 Keb. 26, 32.
1 Vent. 206.
2 Vent. 25.
1 Danv. 205.

Parson,

Vid. 2 Lev. 61.
3 Leon. Caf.
46 & 148.
4 Leon. Caf. 367.

Parson, Vicar and Curate.

Birch *versus* Wood. Hill. 10 Will. III. B. R.

Curate is re-
moveable at
the Will of
the Parson.
Cafes B. R.
249. S. C.

WOOD, pretending to be Curate of a Chapel of Ease in the Parish of Preston, sued the Vicar of the Parish in the Spiritual Court, for the Arrears of a Pension claimed by Prescription; and a Prohibition was granted Nisi causa; for that the Curate was removeable at the Will of the Parson, and so cannot prescribe, but his Remedy must be by Quantum meruit.

Vide Faresl. 63. That Parish-Bounds are not to be proved by the Parson.

Poor Prisoners, vid.
post 521.
2 Lev. 142.
6 Mod. 22,
301.

P A U P E R.

Anonymus. Mich. 9 Will. III. B. R.

(1.)
Pauper shall
pay Costs of
Nonsuit.
See 1 Sid. 261.
6 Mod. 88.
Faresl. 114.

A Pauper shall not pay Costs, unless he be nonsuit; but then he shall pay Costs, or be whipped; per Holt C. J. Quare tamen; for afterwards in another Term, I move that a Pauper might be whipped for Non-payment of Costs upon a Nonsuit, and the Motion was denied per Holt C. J. saying, he had no Officer for that Purpose, and never knew done. Note also; If a Pauper gives Notice of Trial, and does not proceed, he shall be dispaupered.

Anonymus. Mich. 11 Will. III. B. R.

MR. Northey moved to dispauper a Parson, who was Plaintiff in an Action, because he had a Living of 40 l. per Annum. Turton and Gould Justices contra, because he swore he was in Debt more than it was worth. Holt C. J. differed from them; for his being indebted, or his Estate being mortgaged, is no Reason; 'tis enough, that he has a considerable Estate in Possession.

(2.)
Dispauper-
ing.

Payment and Satisfaction, &c.

Vide ante
442.
2 Lev. 203,
212.
6 Mod. 36.
Post 519.

Mason *versus* Williams. In Canc'.

PENDING a Bill in Equity against an Executor, or after a Decree Quod computet, an Executor may pay any other Debt of a higher Nature, or as high a Nature; but this must be intended where he has legal Assets; for if he has only equitable Assets, the Court will not indemnify him, and suffer him to prejudice and disappoint the first Suitor; and where there is a final Decree against an Executor, and he pays a Bond, it is a Dispayment; for a Decree is in the Nature of a Judgment. Per Cowper Lord Chancellor.

(1.)
Executor
may pay
Debts of a
higher Na-
ture after a
Decree quod
computer,
not after
final.
See Cro. El.
793.
2 And. 157.

1 Rol. Abr. 925, 927. 1 Sid. 21. Vaugh. 89. 5 Co. 28. 2 Chan. Caf. 54, 84.

Carter *versus* Sheppard. Pasch. 10 Will. III. B. R.

UPON a Point referr'd at Nisi Prius, the Case was; H. having a Note of 100 l. upon a Goldsmith, goes to receive it: While he is in the Shop, one Daly brought Money in to pay to the Goldsmith, who thereupon orders H. to receive the Money of Daly; accordingly H. receives 50 l. Part of his Hundred, pulls a Bag out of his Pocket, puts the Money into the Bag, lays it down by him, and proceeds to tell the rest; in the mean Time

(2.)
A. receives
Money of B.
by the Hands
of C. 'tis A.'s
Money, and
he must abide
by the Loss.
See 6 Mod.
36.

a Stran. 36.
2 Salk. 442.

5 Mod. 298. S. C. Comb. 475. Cases B. R. 189.

Vide ante
442, &c. ib.
3 Mod. 86.
3 Lev. 299.
2 Show. 296,
297.
Molloy Li. 2.
c. 10.
Comb. 475.
S. C.
Hob. 154.
2 Mod. 23, 24.

a Stranger comes in, catches the Bag of 50 l. from him, and runs away: H. brings Trover against the Goldsmith for his Note pretending the Property of the 50 l. remained in the Goldsmith, tho' put into the Plaintiff's Bag; for he had still a Right to count it over, and so it was not absolutely paid to the Plaintiff. Cur' contra. H. had appropriated the Money, by putting it into his Bag, and might bring Trover for the Bag and Money, as well as if he had put both Bag and Money into his Pocket.

(3.)

Payment before Breach or after.

Vide Lutw.

472, 473.

5 Co. 117.

3 Salk. 118.

S. C.

Holt 122.

Marle *versus* Make. Trin. 13 Will. III. B. R.

Payment to a Bond with Condition indorsed, is a good Plea before Breach, but not afterwards, no more than to an Action of Debt upon a single Bill; for the Benefit of the Condition is lost when the Breach is made. Per Holt C. J.

Cranmer's Case. In Canc'.

(4.)

Legacy to a Creditor, greater or less than the Debt, how to be taken. Vide Curthbert cont. Peacock. Ante 155, 415, 436. 2 Chan. Caf. 25.

MRS. Fisher was indebted in 50 l. to Cranmer, and left him a Legacy of 500 l. and made him Executor, and after the making of her Will borrowed 150 l. more of him, and died: The Master of the Rolls decreed, that this Legacy should be a Satisfaction of both the Debts, that contracted after the Will, as well as that contracted before; but Harcourt, Lord Chancellor, reversed the Decree, because a Court of Equity ought not to hinder a Person from disposing of his own as he pleases; and when he says he gives a Legacy, we cannot contradict him, and say he pays a Debt; as to the Debt contracted afterwards, he said there was no Pretence to make this to be a Payment of that: If a Legacy is less than the Debt, it was never held to go in Satisfaction; if the Thing given was of a different Nature, as Land, it should not go in Satisfaction of Money; so if the Legacy be upon Condition, for by the Breach he may be a Loser, whereas the Will intended it for his Benefit. Note; In all these Cases the Intention of the Party ought to be the Rule.

Payment to the Sheriff on a Fi. Fa. is good, not so to the Gaoler. 2 Lev. 203.

Where Payment to the Plaintiff by the Bail is a Discharge. Vide ib. 212.

Note; Payment was formerly no Plea to a Sci. Fa. on a Judgment in Debt, but now it is by the Stat. 4 & 5 Ann. cap. 3 Lev. 19, 20.

Peers of the Realm.

Vide Parlia-
ment Cases,
pag. 1 to 11.
Farell. 15, 38.
1 Chan. Caf.
221.
2 Chan. Caf.
163, 224.

Rex & Regina *versus* Knollys. Trin. 6 W. & M. B. R.

Indictment was found at Hicks's Hall against Charles Knollys, for the Murder of Captain Lawson, which was removed into B. R. The Defendant pleaded in Abatement, That William Knollys, Viscount Wallingford, by Letters Patent under the Great Seal of England, which he produced in Court, bearing Date August 18. 2 Car. 1. was created Earl of Banbury, to him and the heirs Male of his Body: That William had Issue Nicholas, who succeeded him in the said Title; and that the said Honour descended to him the Defendant from the said Nicholas, as Son and heir: Et hoc paratus est verificare. It was replied, That 14 Decemb. 4 W. & M. the said Defendant petitioned the Lords then assembled in Parliament to be tried by his Peers, and the Lords disallowed his Peerage, and dismissed the Petition.

The Defendant demurred, and the Attorney General joined in Demurrer.

The first Point considered per Holt C. J. was, What an Earldom was, and wherein it consisted?

Before the Time of Ed. 3. there were but two Titles of Nobility, viz. Earls and Barons.

Barons were originally created by Tenure, afterwards by Baron. Writ, and last of all by Patent; scil. about 11 R. 2.

As to Earls, 1st, They were always created by Letters Patent. Vide Seld. 536.

2dly, An Earldom consisted in Office for the Defence of the Kingdom. Vide Bract. lib. 1. c. 8. Comites had their Name, not from Counties, but à comitando Regem. 9 Co. 49. It may be styled as any other Office may, within Westm. 2.

3dly, Earldoms consist of Rent and Possessions, &c. which were anciently great. Vide Mag. Chart. The Relief of his heir 100 l. This being premised, he went on to consider the Objections:

1st, That it is not alledged by the Defendant, that he is unus parium Regni Angliæ, but only unus parium Regni; nor is Banbury alledged to be in England, and an Irish Peer may be made under the Great Seal of England.

Vol. II.

O 2

To

nuti, c. 17. and Saxon Chron. sub Anno 1055.

(1.)
Ante 47. S.C.
Post 512.
3 Salk. 242.
Carth. 297.
Comb. 273.
Skin. 336,
517.
Cases B.R. 55.
Holt 530.
Trem. 11.
8 S.T. 50, 58.

Earl, his
Creation and
Office.
Note; In the
Saxon Times
the Earls of
Counties be-
ing officary,
were elected
by the Free-
holders in
their Folk-
motes, and
were re-
moveable for
male Admi-
nistration.
Vide LL.
Edw. c. 35.
LL. Eadgari,
c. 5. LL. Ca-

King may
create an
Irish Peer
under the
Great Seal
of England,
by express
Words.
2 Vent. 4.
Dyer 303.

Place
whence Ti-
tle is taken,
not material.

To this he answered, That the Great Seal of England is appropriated to England, and what is done under it has Relation to England, and to no other Place; and tho' the King may create an Irish Peer under his Great Seal of England, yet that must be by express Words, being by Special Act of Privilege. An Act of Parliament does not extend to Ireland, unless particularly named; and 'tis a foreign Intendment to suppose him an Irish Peer, and therefore is to be rejected.

The Place from whence an Earl takes his Title, is not material; 'tis not necessary there should be such a Place in England, or indeed any where. Albemarle is not in England, and there is really no such Place as Rivers, tho' we have an Earl of the Name.

2dly, 'Tis objected, That the Defendant ought to have concluded his Plea, with prout patet per Recordum, and have produced a Writ to certify the Descents.

As to the Writ to certify the Descents, that is not of Necessity, but used merely for Expedition; and if his Peerage had been created by Writ, then it would have been triable by the Record, and this a fatal Exception: But Letters Patent may be pleaded as shewn to the Court, and the adverse Party cannot deny them. And as this Case is, here being Descents, if the Defendant be concluded as the King's Counsel say he should, it would have been an impracticable Conclusion, and consequently void. As in the Precedents cited of the other Side, there were no Letters Patent pleaded; nor could there in this Case be any such Issue Earl, or not Earl; for the Letters Patent under the Great Seal could not be denied or questioned, but by pleading Non concessio.

3dly, That the Defendant is concluded of his Peerage by the Order of the House of Lords.

House of
Lords can-
not deprive
of Peerage.
Parliament
Cas. 2, 3, &c.

To this Eyre J. said, The Defendant had a Title to his Honour by legal Conveyance, and that it was under the Protection of the Common Law, and could not be taken from him but by legal Means. That the House of Lords could no more deprive one of a Peerage, than they could confer a Peerage: That the Defendant's Right stood upon the Letters Patent, and his Legitimacy; that the Letters Patent could not be cancelled without a Scire facias; and that the Defendant could not now be proved a Bastard, or illegitimate.

Judicial
Power of
Parliament
in the Peers,
but 'tis vir-
tually the
Judgment of
the King.
All Juris-
diction from
the Crown.

Holt C. J. gave these Reasons: 1st, That this Order is not a Judgment of Parliament; the Parliament consists of the King, the Lords Spiritual and Temporal, and the Commons. The judicial Power is in the Lords only; yet legally and virtually it is the Judgment of the King, if not of the Commons. And Writs of Error in Parliament are coram nobis in præsentia Parlamento. Vide Fleta, c. 17. All Power of Jurisdiction is reserved from the King; if that be an Author to be credited.

The House of Lords has a double Authority, as Parliament, House of Peers has a double Authority, and the Course of the House, between which we must distinguish by their Style. Journals are no Records of Parliament, and therefore we cannot take Notice of them. Hob. 110. King and Hunsdown versus Arundel and Howard. Judgments ought to be given in their proper Style; and therefore if this Court, which is coram Rege, enter Judgment per Justiciarios de B. R. 'tis void.

The House of Lords has no Jurisdiction over an original Cause mixed with Matter of Fact; because, 1st, that Supreme Court is the Dernier Ressort; besides that, for the most part, original Causes are mix'd with Matter of Fact, and it is below the Dignity of so supreme a Judicature to try a Matter of Fact: 'Tis for this Reason, Error in Fact, in the Court of King's Bench, must of Necessity be redressed before the Judges of this Court. 2^{dly}, If the Parliament should take Cognizance of original Causes, the Subject would lose his Appeal, so much indulged by the Common Law in all Cases. Causes come not thither, till they have tried all other Judicatures: For this Reason, within these four Years, Judgment was given against the Earl of Macclesfield in the Exchequer; he brought Error in the House of Lords; and the Question was, Whether by 31 Eliz. 3. the Exchequer-Chamber should not interpose? And the Writ was abated; and it was held, that the Exchequer-Chamber should interpose. This Dignity is a Title by Common Law; and if a Patentee be disturbed of his Dignity, the regular Course is, to petition the King, who indorses it, and sends it into the Chancery. Vide Staundf. Prerog. 72. 2 E. 3. 5. Long 5^o E. 4. 117. The King could give Precedency by the Common Law, but is bound by 31 H. 8. c. 10.

But no original Jurisdiction.

When Error lies not from the Court of Exchequer to the House of Lords.

Where a Patentee is disturb'd of Dignity, how to proceed.

If a Peer commits Treason, he must be tried by his Peers, and they may order a Trial; but the King may chuse whether he will make a High Steward.

2^{dly}, No Plea was depending in the House of Lords; for the Defendant did not petition to enjoy, but supposed himself in Possession.

3^{dly}, Here was no Judgment. A Court can give no Judgment in a Thing not depending, or that does not come in a judicial Way before that Court: Here the Title of the Earldom was not before them. If Trespass be brought for a Trespass done in the Ground belonging to a House, and it appears at the Trial the Plaintiff has no Title to the House, yet the Court cannot give Judgment to turn him out.

4^{thly}, A Judgment ought to be compleat and formal: If a Quo Warranto be brought for usurping Royal Franchises, and the Court give their Opinion that the Defendant has no Title; yet unless they go on, Et quod ab inde excludatur, &c. it is nothing. So in the Case of Lovell, 2 Cro. 284. In Debt on an Obligation, the Defendant pleaded a Bar by Verdict and Judgment in a former Action,

Judgment must be compleat and formal.

Dismissal is
no Judg-
ment.

Lex Parlia-
menti.
Ant. 503, 504.

Inheritances
not original-
ly determi-
nable in Par-
liament.

Action, wherein the Entry was, that the Defendant should recover Costs, Et quod eat inde sine die: Here, because there was no Judgment, quod querens nil capiat per breve, it was adjudged naught; for Dismissal is no Judgment in a Court of Law.

Objection: It is said that this Judgment was given secundum legem Parliamenti.

Ans. Lex Parliamenti must be looked on as the Law of the Kingdom; but admitting it were a particular Law, yet if the Question arises determinable in the King's Bench, the King's Bench must determine it. Vide Dy. 60.

14 Car. 2. C. B. Binion versus Eveling. Filing an Origin against a Parliament-Ban was adjudged to be no Breach of Privilege. If a Ban be committed by Parliament, and the Parliament is prorogued, this Court will grant a Habeas Corpus. No precedent hath been shewn to warrant the determining Inheritances originally per legem Parliamenti; if it be so determinable it must be by Act of Parliament, but there is no such; or by Custom, but there is no such Custom: But if Inheritances were determinable in Parliament, without their having Jurisdiction, they would have uncontrollable Power, and res est misera, ubi jus est vagum. And he concluded that Judgment should be given for the Defendant, and accordingly the Indictment was abated: So the Defendant was not tried for the Murder at all.

Lord Banbury's Case. Pasch. 5 Ann. B. R.

(2.)
H. arrested
by the Name
of a Com-
moner, the
Court won't
try whether
a Peer or
not, upon a
Motion.
Vide antea
451, 509.
Parl. Cases,
2, 3, &c.
Farell. 15, 38.

LORD Banbury was taken on a Latitat sued against him the Name of Charles Knollys, Esq; and it was now moved for a Superfedeas, offering to shew the Letters Patent of Creation, and an Affidavit that he was the Person; and it was agreed, That if the Latitat had been sued against him by the Name of Lord, it should have been superseded; for the Law supposes a Peer able to answer the Demand of any personal Action, and the Body is only liable for Want of being responsible in Substance. And if he had sat in Parliament by Virtue of any Writ of Summons, and had been sued as Charles Knollys; but not having sat in Parliament, they could not take Notice of his Peerage, and would not proceed to try it on a Motion.

Sir Thomas Meers contra Lord Stourton. In Canc.

(3.)
Where a Peer
shall depose
on Oath or
Honour.
1 Will. Rep.
146 S. C.

SIR Thomas Meers exhibited a Bill against the Lord Stourton and it was ordered that the Lord Stourton should be examined upon Interrogatories touching his Title; and it was objected That he being a Peer of the Realm, ought to answer upon his Honour.

Honour only; and it was ruled by Harcourt Lord Keeper, that where a Peer is to answer to a Bill, his Answer put in upon his Honour is sufficient; but where a Peer is to answer Interrogatories, to make an Affidavit, or be examined as a Witness, he must be upon his Oath.

PERJURY.

3 Mod. 116, 134. 6 Mod. 176, 168. 5 Mod. 343, & 348. 1 Hawk. P. C. cap. 69.

See Farf. 101
2 Show. 1,
2, 165, 486.

Dominus Rex *versus* Greepe. Mich. 9 Will. III. B. R.

5 Mod. 343.
S. C.
Carth. 421.
Holt 535.
Comb. 459.

AN Information for Perjury set forth, That the Defendant, upon giving a Lease and Release in Evidence in a certain Cause, bearing Date the 15th and 16th of July 1681. executed at Albemarle House, to which Mr. Stroud was Witness, swore that Mr. Stroud was the Middle July 1611. at Newnham, innuendo Newnham in Devonshire, *in* revera non fuit apud N. prædict. A Verdict was for the King, Judgment was arrested; and it was held, That Newnham was but an individuum vagum without Innuendo, and might be as well Newnham in Middlesex as Newnham in Devonshire, or some far distant Place: And if Newnham was at the next Door, Stroud might be at Newnham, and yet be at Albemarle-House in Middlesex too in the Middle July.

That the Innuendo could not restrain the Individuum vagum to Newnham in Devonshire; for it is no Averment, but the Nature of a Prædict. It may serve for an Explanation to point out where there is precedent Matter, but never for a new Charge: It may apply what is already expressed, but cannot add to, or change the Sense of the precedent Words: So the Word Newnham did not import Newnham in Devonshire; ergo, the Innuendo cannot enlarge the Importance of it, and make it so significant. Vide Sty. 333. 3 Cro. 428. Goldsb. 1. Hob. 3, 6, 45. 1 Ro. 82, 83, 84. 2 Bul. 81, 82. 1 Ven. 337. 1. 44. 4 Co. 20. Yelv. 21. 1 Cro. 321. A. 32.

Innuendo.
Vid. Yel. 21.
Cro. El. 497.
Hob. 2, 3,
45, 461.
Hutt. 65.
Hertl. 174.
Aley 39, 92.
1 Vent. 337.
1 Sid. 52.
2 Show. 305,
& 411.
3 Mod. 53, 54.
3 Lev. 69, 166.
Innuendo
may explain
or apply, but
cannot add
to, or change
the Sense.
Carth. 421.
S. C.
5 Mod. 233.
4 Rep. 17.
Comb. 459.
S. C.
3 Bulst. 265.
1 Bulst. 183.

Perjury may
be in Evi-
dence to the
Credit of a
Witness.
6 Mod. 168.

Charge
ought to be
equally cer-
tain at Com-
mon Law,
and on the
Statute.

Where H. is
convict on
the Statute,
Disability is
Part of the
Judgment;
at Common

Law 'tis only a Consequence. Vide ante 461. Post 689, 691.

3dly, That a Man ought not to be drawn into a construction of Perjury; and that if the Matter of this Oath was certain, it is material to the Issue, and sufficient to be Perjury; and Holt C. J. denied Goldf. 191. and held, that if a Man gives Evidence to the Credit of a Witness, tho' this be not the Issue, yet 'tis Perjury.

4thly, As to the Objection, That this was an Information at Common Law, and not on the Statute, that makes no Difference as to the Certainty of the Charge; for 'tis no more infamous now than it was at Common Law; the Difference is only that where H. is convict upon the Statute, 'tis Part of the Judgment to be disabled; but at Common Law 'tis only a consequential Disability: Ergo, in the later Case the King may pardon, and that restores him to his Testimony; otherwise in the former, for in that Case he must reverse the Judgment, or cannot be restored.

Vide ante
Abatement,
Demurrers,
Justification,
&c. p. 496.

Pleas and Pleadings.

Anonymus. Mich. I W. & M. B. R.

(1.)
Upon an In-
formation in
Middlesex,
the Defen-
dant shall
have the
Term to
plead; in the
Country, till
next Term.
Post 624, 650.
Mod. Cases
22.
1 Salk. 219.

IF a Man be bound by Recognizance to appear the first Day of the Term, and is charged upon his Appearance with Information, in Case the Information be laid in Middlesex, the Party has Time to plead during all that Term, so that it cannot come to Trial in the Term; but in case it be laid in another County, the Party shall have Time to plead till the next Term, for he is as much concerned to defend himself in these Cases as in any Civil Action; and since the Law allows him Counsel, the Law allows him Time likewise to consult with them; for not to allow the Means of Defence, is to take away the Subject's Defence; otherwise it is of capital Offences: Note; In these Cases there is no Counsel. Also where the Party comes in by Capi Corpus, or upon an Outlawry, he shall plead presently, for then he has been guilty of a Contempt. Per Curiam Contrary to the Case of the Seven Bishops.

Time to plead, Vide post, pl. 3, 4.

Woodward *versus* Cliff. Pasch. 2 W. & M. B. R. Vide 2 Lev. 12, 75.

IN Covenant, the Plaintiff declared that he was seized in Fee, and that by Indenture made between the Plaintiff and Eliz. his Wife ex una parte, and the Defendant of the other Part, testatum existit that the Plaintiff and his Wife demised. 'Twas objected, That it being shewn that the Husband was sole seised, the Husband and Wife could not demise; sed non allocatur; for it is not affirmed, but only that by the Indenture 'tis witnessed, for the Testatum is a Rehearsal of that.

(2.)
Testatum existit is only Recital.
Post 589, 699.
2 Lev. 74, 75.

Hall *versus* Englestone. Mich. 8 Will. III. B. R.

UPON a Habeas Corpus returnable in Michaelmas Term, if the Declaration be delivered before Crastinum Animarum, the Defendant must plead to try; but upon a Capi Corpus he is only to plead to enter. So in Easter Term, if the Declaration be deliver'd before Mens. Paschæ, the Defendant on a Habeas Corpus must plead to try; upon a Capi Corpus to enter only.

(3.)
Difference between Time to plead on a Habeas Corpus and a Capias.
Ante pl. 1.
Post pl. 15.

Anonymus. Mich. 8 Will. III. B. R.

IF a Declaration be delivered against one in Custody, he shall have the whole Term to plead in Abatement.

(4.)

Anonymus. Mich. 8 Will. III. B. R.

BEFORE Joinder in Demurrer, the Defendant may waive his special Plea, and plead the General Issue, per Cur', But there be a Rule to plead, so as to stand by it, and the Defendant pleads a special Plea, as he may, and the Plaintiff demurs, the Plaintiff shall not then waive and plead the General Issue.

(5.)
Waiver of special Pleadings.
Farell. 50.

Pierce *versus* Blake. Hill. 8 Will. III. B. R.

THE Defendant pleaded a false Plea in Abatement, viz. That the Plaintiff was dead; the Court was moved, that the Attorney might be compelled to swear it: Et per Holt C. J. we cannot compel him in any Case to swear his Plea, but where is a foreign Plea; but the Attorney, if he puts in a false Plea to delay Justice, breaks his Oath, and may be fined for putting a

(6.)
Attorney fined for signing Errors notoriously false and frivolous.
S. C. Holt 560.

1 Salk. 30,
20, 202.
Lutw. Rep.
236.
Styl. 225.
Sid. 329.
1 Saund. 97,
98.

Deceit upon the Court: He remembered a Case where Judgment was given against a Defendant above forty Years of Age, upon which Judgment he brought a Writ of Error, and assigned Infancy, and appearing by Attorney for Error, and the Court fined the Attorney: In the principal Case the Court ordered the Attorney to plead immediately, so as he would stand by it; or the Court if he did not, would inquire into the Truth of the Plea, and if they found a Deceit and a Trick, they would fine him.

Note: The Court will not order a Man to plead peremptorily till the Rules be out.

Brown versus Cornish. Pasch. 9 Will. III. B. R.

(7.)
Onerari non
debet proper
only where
there never
was a Charge.

INDEBITATUS ASSUMPSIT and Quantum meruit for 20 l. The Defendant pleaded, Onerari non debet, because he paid the Money at the Time, &c. Et hoc paratus est verificare. The Plaintiff demurred: Et per Holt C. J. 1st, This Plea does not amount to the General Issue, because it admits the Cause of Action. 2dly, Onerari non debet is no Plea here, because he allows the Promise to be a good Promise, but avoids it by Matter of Discharge ex post facto; in this Case he should have pleaded Actionem non. But where the Matter of the Plea shews there never was a good Cause of Action, Onerari non debet may be proper; thus in Debt on a Bond, Defendant may plead Onerari non debet quia riens per Discent. 3dly, The Plea was misconcluded, for he ought to conclude to the Country.

(8.) *Ashton versus Sherman.* Mich. 9 W. III. B. R. Vid. *this Case, Title Executors, Pl. 10. pag. 298.*

Anonymus. Mich. 9 Will. III. B. R.

(9.)
Plea after
Judgment in
Ejectment.

IF Judgment in Ejectment be signed in a Country Cause for Want of a Plea, but no Possession delivered, a Judge in Chamber at any Time before the Assizes, may compel the Plaintiff to accept a Plea; but if Possession be delivered, he is without Remedy, per Holt C. J.

Gray *versus* Hart. Hill. 9 Will. III. B. R.

IN Assault and Battery, the Defendant pleaded a Writ to the Sheriff returnable in C. B. and a Warrant to him to arrest the Plaintiff, &c. and did not shew from what Court the Writ issued; and it was held naught; for it might be a Writ out of the King's Bench or the County Palatine, and they would not intend it a Writ out of Chancery: So if H. plead a Judgment, he must shew in what Court; for to put the adverse Party to search in every Court, would be infinite.

(10.)
In justifying
under a Writ,
it is not
enough to
shew where
returnable,
but must
shew whence
it issued.
S. C. 2 Lutw.
1488.
N. L. 470.

Anonymus. Mich. 10 Will. III. B. R.

THE Court resented the Number of frivolous Sham Pleas, which came before them, saying, It was against the Duty of Counsel, and against the Statute W. 1. c. 29. and that the Rule ought to be revived, viz. That Counsel should set their hands to the Books delivered to the Judges, which was anciently ordered, that the Court might not be troubled with frivolous Pleas.

(11.)
Sham Pleas.

Rafmore *versus* Serj. Goodwin. Trin. 11 Will. III. B. R.

Erjeant Darnel moved for an Impar lance till the next Term; because the Defendant was an Officer of the Court, and the Bill was not filed against him, so as to give him eight Days within Term to plead; But the Court held, That the Day of the Bill filed is one Day, so that the Plaintiff may give Rules that Day; also they agreed, that Sundays and Holydays are to be reckoned in: And the Clerks said it was sufficient that he had four Days in Term, quod Curia Concessit; Mr. Clark said, that anciently there were two Rules given, both four Day Rules; the first was, ad respondendum, the second Ad respondendum peremptorie, which two were now turned into one eight Days Rule.

(12.)
Upon Bills
filed against
Officers it is
sufficient, if
there be four
Days within
Term to
plead.
Vide ante pl.
1, &c. ib.
Comberb. 19,
251, 253.
Farell. 62.

Anonymus. Trin. 11 Will. III. B. R.

THE Question was, Whether there ought to be new Rules to plead upon an Amendment? Pew, Clerk of the Papers, said, that if the Plea was of another Term, there ought to be new Rules; otherwise if it be a Plea of the same Term, because there is a Rule to warrant the Judgment. Holt C. J. Anciently they did not plead de novo after an Amendment; therefore giving

(13.)
No new
Rules to
plead after
an Amend-
ment, unless
an Impar-
lance be gi-
ven.

Post pl. 20.

ving Rules to plead again, cannot be the ancient Course; because the Practice of Pleading de novo is but of late introduced, but with great Reason: When the Plaintiff amends and gives an Imparlance, there should be new Rules; otherwise not.

See 1 Salk. 47. Information amended after Plea pleaded. Quare

Wood *versus* Cleveland. Pasch. 12 Will. III. B. R.

(14.)
Judgment set
aside tho'
strictly regu-
lar, in order
to try the
Merits.
Vide 6 Mod.
191, 241.
1 Salk. 399,
401.
1 Mod. 1.
Farell. 3.
1 Roll. Abr.
774. pl. 1.
Cro. Car 443.
Hob. 194.
S. C. Holt
560.

IN a common Action of Trespass, the Plaintiff signed Judgment for Want of a Plea; the Defendant after Term and before the Assizes, offered him a special Plea, or to plead the General Issue, provided the Plaintiff would consent to enter into a Rule, that he should at the Trial be allowed to give special Matter in Evidence; the Plaintiff refused, and executed a Writ of Inquiry: And now Sir Bartholomew Shower moved, that upon paying Costs the Judgment might be set aside, and the Plaintiff obliged to accept their Plea and go to Trial, the Plea being fair and containing special Matter of Title. The Motion was granted; for, per Holt C. J. Where the Defendant's Plea was a fair Plea, and no Delay affected, we will interpose; otherwise where a Plea contains special Matter that is questionable, and was designed to draw the Plaintiff to demur.

Anonymus. Trin. 12 Will. III. B. R.

(15.)
How the De-
fendant shall
plead after a
voluntary
Appearance.

Vide ante pl.
1 & 3.

THERE was a Question, If a Man appears voluntarily before Menssem Paschæ in Easter Term, whether he be obliged to plead to enter? Sir Samuel Astry and Mr. Clark were of Opinion he was not. But per Holt C. J. There is no Difference between a voluntary Appearance and an Appearance upon a Corpus; for a voluntary Appearance is not good, unless a Writ hath been taken out: And there is no Reason for it; for if the Plaintiff be content with a voluntary Appearance in Case of the Defendant, there is no Reason why the Plaintiff should be in worse Condition than if he had arrested him: Let the Rule be, a Writ be taken out, and the Defendant agrees to appear, shall appear and plead according to the Return of the Writ, and if the Return be before menssem Paschæ, he shall plead to enter; but if no Writ were taken out, he shall not be obliged to appear; but if a Writ were taken out returnable after menssem Paschæ, shall have an Imparlance till next Term.

Peirce *versus* Paxton. Trin. 13 Will. III. B. R. Vid. ante 508.
2 Lev. 212.

IN Debt on a Bond, the Defendant Ples darrein Continuance (16.)
pleaded Payment of Part, and an Acquittance in Abatement. Payment of
Upon Demurrer Holt C. J. held it a Plea in Bar, and not in Part, and Ac-
quittance
Abatement. Vide 3 Cro. 342. Al. 63, 65. 3 Cro. 157. What is a pleaded Puis
Bar before the Action brought, is as much a Bar after, for Time darrein Con-
makes no Difference in the Nature of the Thing. Vide 7 E. 4. 15. tinuance is
Sey. 212. is a dark Case. Entry into Part differs; for that is in Bar.
without the Consent of the Plaintiff. But the Plea is not good, S. C. Cases
because the Acquittance is a Deed, and ought to be pleaded with B. R. 541.
Profert. Judgment to answer over. Holt 569.
Vide 3 Lev.
230.
Lutw. 1177,
1142.
5 Mod. 12.

Anonymus. Trin. 13 Will. III. B. R.

IF an Act of Parliament makes Writing necessary to a Common (17.)
Law Matter, where it was not necessary by the Common Where a Sta-
Law, you need not plead the Thing to be in Writing, but give tute creates a
it in Evidence; but where a Thing is originally made by Act of new Thing
Parliament, and required to be in writing, you must plead it with in Writing, it
all the Circumstances required by the Act; as upon the Statute must be so
of H. 8. of Wills, you must plead a Will to be in Writing; but pleaded; but
a collateral Promise, which is required to be in Writing by the where it only
Statute of Frauds, you need not plead to be in Writing, tho' adds it to a
you must prove it so in Evidence. Per Holt C. J. Common
Law Matter,
it needs not.
Lutw. 1425.
1 Sid. 142.
1 Lev. 81.

Anonymus. Trin. 13 Will. III. B. R.

IF a Man pleads over, he shall never take Advantage of any (18.)
Slip committed in the Pleading of the other Side, which he Nothing can
could not take Advantage of upon a general Demurrer. Per be taken Ad-
Holt C. J. See 6 Mod. 136. vantage of on
a Plea over,
which could
not on a ge-
neral De-
murrer.

Anonymus. Trin. 1 Ann. B. R.

IF a Man has forfeited his Bail-Bond, and so is in misericor- (19.)
dia, and the Court in Favour of him stay Proceedings there- After Bail-
upon, he cannot afterwards plead in Abatement to the original Bond forfeit-
Action, but must plead in Chief. ed, Defen-
dant cannot
plead in A-
batement in
the original
Action.

Ano-

Anonymus. Mich. 2 Ann. B. R.

(20.)
Amendment.
Ante pl. 13.

BY the Course of the Court, if the Plaintiff moves to amend his Declaration the same Term the Defendant's Plea comes in, the Plaintiff need not give new Rules to plead; but the Defendant must plead in convenient Time.

1 Salk. 47.

Anonymus. Mich. 2 Ann. B. R.

(21.)
Reason of
Amendment
while in Pa-
per.

SINCE Pleading in Paper is now introduced instead of the old Way of Pleading ore tenus at the Bar; it is but reasonable after a Plea to Issue, or Demurrer joined, that upon Payment of Costs the Parties should have Liberty to amend their Plea, or to waive their Plea or Demurrer while all the Proceedings are in Paper.

S. C. 1 Salk.
208.
6 Mod. 157,
197.
Ante 208.

Fanshaw *versus* Morrison. Pasch. 4 Ann. B. R.

(22.)
Scire facias
upon a Re-
cognizance
of Bail in
Error.
See 6 Mod.
159.
1 Saund. 3, 6.
2 Lev. 7.

SCIRE FACIAS upon a Recognizance entered into before Judge of the Common Pleas, upon a Writ of Error of Judgment given in that Court in Debt, conditioned that if the Plaintiff should be nonsuit, the Writ of Error discontinued, Judgment affirmed, that then he should pay, &c. The Defendant prayed Oyer, and pleaded that the Plaintiff in Error did prosecute the Writ of Error, and assigned Errors, Et quod placitum super prædict. breve de errore adhuc pendet indeterminat', &c. The Plaintiff replied, that the Judgment was affirmed, abique hoc quod placitum pendet indeterminat', &c. The Defendant demurred, and Judgment was given for the Plaintiff in C. B. and now upon a Writ of Error, the Court held, That where a Defendant pleads a Performance, he ought to plead it in the Words of the Condition of the Bond, 3 Lev. 293. 2 Ven. 221. Dy. 243. but otherwise where he pleads an Excuse; and that the Defendant's Plea is an Excuse in this Case, and therefore it was not necessary to plead that the Plaintiff in the Writ of Error was nonsuit, nor the Writ discontinued, nor the Judgment affirmed, but that Errors were assigned, & placit' inde pendet indeterminat'.

Performance
must be
pleaded in
the Words of
the Condi-
tion; other-
wise of Ex-
cuse.
Lutw. 419.
420, 471, &c.
3 Lev. 245.
1 Lev. 145.
Negative
Plea need not
conclude
prout patet
per record'.
3 Lev. 152,
311.
5 Mod. 8.
1 Lev. 54,
212.
1 Lutw. 111,
207, 264.
Farell. 106.

2dly, The Court held this Plea was in the Negative, and therefore there was no Occasion for the Defendant to conclude with a prout patet per recordum: But the Plaintiff ought upon this Plea to have replied, that the Record was certified in B. such a Term, Et quod superinde talit' process' fuit quod Ju-

sum affirmat' fuit prout patet per recordum; to which, if it was
 not so, the Defendant might rejoin Nul tiel record.
 3dly, The Court held the Replication naught; 1st, Because it
 takes that Matter of Inducement which should have been the
 point in Issue; and, 2dly, Because the Traverse puts a Matter
 of Record in Issue to be tried by the Country: And upon this the
 Court were going to reverse the Judgment, but an Exception
 was started to the Writ of Error, for which it was quashed.

2 Rol. Abr.
 275.

Traverse,
 that puts
 Matter of
 Record in
 Issue to the
 Country,
 is ill.

Vid. 1 Saund.
 20, 99.

Lutw. 633, 1138, & Hustler versus Raines, lb. 1401.

Domina Regina versus Rawlins. Mich. 3 Ann. B. R. (23.)
vide this Case, Title Imparlance, Pl. 3. Ante 367.
When the Defendant ought to plead to an Information.

Turner versus Beale. Pasch. 5 Ann. B. R.

IN Assumpsit, the Defendant cognovit actionem, but in Bar of
 Execution as to his Person, Apparel, Bedding, Tools, &c.
 made 2 & 3 Ann. c. 16. and shewed that he was actually a Prisoner
 in the Marshalsea, and that being there tiel jour & ann, he
 was debito modo discharged by the Justices at such a Sessions,
 juxta formam Statuti: To this it was demurred; and insisted, that
 it did not appear that he petitioned; and the Justices ought not
 to assume a Jurisdiction and discharge Prisoners without seeking,
 whether they will or not; and the Defendant ought to shew
 his Qualifications, and that he is within the Benefit of the Act,
 and it ought not be put upon the Plaintiff, who is a Stranger,
 to shew that he was not qualified; *Mr. Eyre contra urg'd,*
 that all was aided by juxta formam Statuti. Vide 1 Cro. 314.
 Cro. 609. Holt C. J. The Sessions cannot intermeddle but
 on Application: You must shew your Discharge, and that it
 is regular and not deficient; The Plaintiff is a Stranger, and
 is not to come on his Side, that the Discharge was deficient,
 you must shew the whole Matter, and give him an Opportu-
 nity to traverse it. Judgment for the Plaintiff.

(24.)

Plea upon
 the Statute
 for Discharge
 of poor Pri-
 soners, ought
 to shew all
 Qualificati-
 ons and Cir-
 cumstances
 to bring the
 Defendant
 within the
 Act.

Vid. ant. 345.
 506.
 Mod. Cases
 22, 301.
 S. C. Holt
 565, 566.

Woodrington versus Deverill. Hill. 5 Ann. B. R.

AFTERWARDS, Hill. 5 Ann. inter Woodrington and De-
 verill, in Debt on a Bond, the same Case happened as
 before, and then the Case last mentioned was remembred, and
 without pretending to make good the Plea in Form, the Statute
 Amendment of the Law, 4 & 5 Ann. c. 16. was insisted on,
 That Judgment shall be given as the Right appears, &c.
 Pen-

(25.)

S. C. Holt
 567.

Pengelly for the Plaintiff said, that here appeared no sufficient Discharge, but a good Cause of Action for the Plaintiff. Powell said, that Ad did not help Substance; that if this sort of Pleading be made good, the Court can never know when particular Jurisdictions are with Authority, and when not; Quod Holt C. concessit, saying, This Exposition was to take the Party's Issue from him.

Vid. ant. 441.
Dr. & St. 130.
Bro. Attachment, 20.
4 Co. 32, 58.
&c. infra.

Pledge and Bailment.

Anonymus. Pasch. 5 W. & M. B. R.

(1.)
Pawn-broker.

IF a Pawn-broker refuses, upon Tender of the Money, to deliver the Goods pledged, he may be indicted; for being secretly pawned, it may be impossible to prove a Delivery in Trover, for Want of Witnesses. Per Holt C. J. Eyre J.

(2.)
Pawn, quid.
Lit. Rep. 332.
Keilw. 82.

Vadium, a Pawn or Pledge. In this Case the Pawnee by a Property, for the Thing is a Security to the Pawn that he shall be repaid his Debt, and to compel the Pawn to pay it.

And how to
be demeaned.

4 Co. 32, 38,
Co. Lit. 89.
Yelv. 178.
Owen 124.
2 Cro. 224.

Now, if the Pawn be somewhat that will be the worse wearing, as Clothes, &c. the Pawnee cannot use it.

But if it be somewhat that will not be the worse for wearing &c. as Jewels, &c. the Pawnee may use them, but then it will be at Peril; for if the Pawnee is robbed in wearing them, he is answerable; and the Reason is, because the Pawn is so far in the Nature of a Depositum, that it cannot be used, but at the Pleasure of the Pawnee; and the using occasioned the Loss. Vide Owen 423. But if the Pawn is laid up, and the Pawnee is robbed, the Pawnee is not answerable.

Also, if the Pawn be of such a Nature, that the Keeping is a Charge to the Pawnee, as if it be a Cow or a Horse, the Pawnee may milk the Cow or ride the Horse; and this is in Recompense of the Keeping.

If a Creditor takes a Pawn, he is bound to restore it upon Payment of the Debt; but if his Care in keeping it be exact, and the Pawn is lost, he shall be excused, for there is no Default in him. 4 Co. 38.
Yelv. 178.
Co. Lit. 89.

And in Case the Pawn be lost, the Pawnee hath still his Remedy for the Money against the Pawner; for the Law requires nothing extraordinary of the Pawnee, but only that he shall use an ordinary Care for the restoring the Goods.

If a Pawn therefore be lost before Tender, the Pawnee is not liable, unless there be Default in him; but if after Tender the Pawnee keeps the Goods, and they are stolen, the Pawnee must answer; for now his Property is determined, and he is a wrongful Detainer; and he that keeps Goods by Wrong, must answer for them at Peril, in all Events; for his Detainer is the Reason of the Loss. Delivered per Holt C. J. In the Case of Coggs and Bernard. Trin. 2 Annæ B. R. Lit. Rep 332.
Owen 124.

Poor, Poor's Rates, Vagrants, &c.

[*Vide Title, Orders, Sessions.*]

After The Inhabitants of the Parish of Talborn and Boston. Mich. 7 Will. III. B. R.

It was held, That if a Man is taxed, and after Taxation stays in the Parish forty Days without giving Notice, 'tis no Settlement within the new Statute unless he pays the Tax; for it must be taxing and paying, and not taxing only, it makes a Settlement, and is equivalent to a Notice in writing.

(4.)
Taxation on-
ly without
Payment,
makes no
Settlement.
Vid. ant. 478.
pl. 21.
Post 534, 536.
1 Show. 12.
Comb. 282.
Ser. and Rem.
179. S. C.

Inter The Parishes of Ryslip and Harrow. Hill.
8 Will. III. B. R.

(2.)
Living in a
Parish, where
H. has Land,
gains a Set-
tlement.
Vide ante &
post 534, 536.
5 Mod. 419.
Ser. and Rem.
224. S. C.

PER Holt C. J. having Land in a Parish will not make Settlement, but living in a Parish where one has Land will gain a Settlement without Notice; for the Act of Parliament never meant to banish Men from the Enjoyment of their own Lands, and the Law takes Notice of Freeholders, as those that chuse Members of Parliament, and are Jurors. Also boarding as a Scholar gains no Settlement, no more than being nursed in a Parish.

The Case of The Parish of Shoreditch. Mich.
10 Will. III. B. R.

(3.)
Justices may
quash the
whole Rate
where the
Rate is un-
equal, and
make, or or-
der to be
made, a new
one.
Vide ante
pag. 484. &
post pl. 5. &
17.
Carth. 464.
S. C.
Holt 508, 513.

AN Order of Sessions was made for quashing a Poor's Rate for the Parish of Shoreditch. Exception was taken, that by the Statute of 43 Eliz. the Justices could not quash the whole Rate, but were to relieve the Parties grieved. Sed per Curiam, a Rate be burthensome to a whole Set of Men, as in this Case it was to Landholders, the best Way is to quash the whole Rate and the Chief Justice held, That if the Justices quash this, they may make a new one themselves, but they are not bound to do so, but may order the ancient Inhabitants to do it.

Inter The Inhabitants of the Parish of Harrow and Ryslip
Mich. 10 Will. III. B. R.

(4.)
Confirma-
tion upon
Appeal is fi-
nal against
all Parishes,
otherwise of
Reversal.
Vide ante
pag. 486. pl.
45, &c. ib. &
post pag. 527.
1 Vent. 310.
Vide ante
492.
5 Mod. 416.
417.
Ser. and Rem.
184. S. C.

A. Comes into Harrow, and being likely to become chargeable, was removed to Ryslip; Ryslip appealed; and upon the Appeal, A. was adjudged to be settled at Ryslip: Afterwards Ryslip discovered that Hendon was the Place of his last legal Settlement, and sent him thither; and the Question was, Whether after the Adjudication upon the Appeal, Ryslip was not estopped against all the World, to say, that Ryslip was not the Place of his last legal Settlement? Et per Holt C. J. Ryslip is estopped to say otherwise; for if Ryslip had not been the very Place of his last legal Settlement, the Justices must have sent him back to Harrow, who were first possessed of him, for that Reason, cause they were possessed of him, and he did not belong to Ryslip. And now this is in Effect the same Question again, viz. Whether he belongs to Ryslip? which Question has been already determined by the Justices on the Appeal, who have adjudged that

was last settled at Ryslip: Now this Point being determined, the Appeal must be final and conclusive, otherwise there would be no End of Things; and the rather as to Ryslip, 1st, Because Ryslip was Party to the Suit wherein this Determination was made, and yet H. may be estopped where he is not Party to a Suit; per Holt C. J. who remembered the Case of Thornton and Pickering, where it was adjudged, That if H. be adjudged by two Justices to be the Father of a Bastard-child, he is estopped as to all Mankind to say the contrary, and any Man may call him so at his Pleasure. The Case was, A Libel was exhibited in the Ecclesiastical Court, for saying he had a Bastard, and the Defendant suggested for a Prohibition this Adjudication by the two Justices; and the Suggestion being turned into a Declaration in an Attachment on the Prohibition, the Defendant pleaded to it, that the Words were spoken at large, without any Relation to the Adjudication by the Justices. Plaintiff replied, and prayed Judgment if he should not be estopped by the Adjudication to say he had not a Bastard.

Afterwards, Hill. 10. this was moved again, and then Holt and Gould held the Adjudication was final as to Ryslip against all Persons and Places, because the Point of his Settlement as to Ryslip was tried in the Appeal; but as to Harrow, (for he had been formerly removed by them to Hendon, and that Order reversed) they were at Liberty to send him to any other Place, and were not estopped; because the Justices on the Appeal did not adjudge him to be settled at Harrow, tho' they adjudged him now to be settled at Ryslip, so that the other Point was not tried. *Turton and Rokeby contra.* Adjournatur.

2 Mod. 72.
10 Co. 101.
6 Mod. 287.

Anonymus. Hill. 10 Will. III. B. R.

A Mandamus was granted to the Justices of Peace on 43 Eliz. commanding them to compel the precedent Overseers of the Poor of the Parish of A. to come to an Account with the present Overseers, and this Writ was now quashed: 1st, For that the Account by 43 Eliz. is to be given to two Justices, and not to the succeeding Overseers. 2dly, Two of the Persons named in the Writ, whom the Justices were to compel to come to account, did not appear to have been Overseers.

(5.)
A Mandamus to compel precedent Overseers to come to an Account with the present, quash'd.
Vide ante 484. & 524.

Post, pl. 17, & 20. 5 Mod. 179, 420, 421. 6 Mod. 77, 97, 98.

After The Parishes of Beckenham and Camberwell.
Trin. 11 Will. III. B. R.

Question was made upon 8 & 9 W. 3. c. 3. which enacts, That an unmarried Person hired for a Year, shall not be compelled, unless he serves the whole Year, whether that extended
Vol. II. Q 2 only

(6.)
Unmarried Person hired for a Year.
Set and Rem. 180. S. C.

Vide post, pl. 11. & pl. 13. only to Cases that might happen after the Act, or to such also as had happened? Et per Cur', To such only as may happen after the Act: It can have no Retrospect, but declares a Law for the future, notwithstanding the Words, declared and enacted. And judged upon a Special Order.

Anonymus. Hill. 11 Will. III. B. R.

(7.)
Vagrant to be sent to the Place of his Birth, and from thence by Order to the Place of his Settlement.

IF H. being settled at A. becomes afterwards a Vagrant, some Justices have thought that to be a Determination of the Settlement; but I never could think so; for if H. be found a Vagrant within 39 Eliz. c. 24. he may be sent to the Place of his Birth; but then by 43 Eliz. c. 2. he may be sent from thence as a poor Person, to the Place of his last legal Settlement; for his being sent to the Place of his Birth, satisfies the Statute of 39 Eliz. and so both the Statutes stand together. Per Holt C. J.

Dominus Rex *versus* The Inhabitants of Audly.
Mich. 12 Will. III. B. R.

(8.)
A standing Rate cannot be made, but must be varied by Circumstances.
Holt 576.S.C.

AN Order of Sessions made upon an Appeal from a Poor's Rate, being removed into this Court by Certiorari, the Case was, on Sept. 1, 1665. a certain Rate was agreed to by the Inhabitants of the Parish of Audly; which had been followed ever since till the last Year, when a new Rate was made. Upon Appeal to the Sessions the new Rate was quashed, and the old one ordered to stand: And now it was objected, that it did not appear that it was a Poor's Rate, being called a Parish-Levy, which might be as well for the Church as the Poor, and then the Justices had no Jurisdiction. Darnel, The Court will intend it. Holt C. J. Twysden used to say, If a particular Jurisdiction does not cover the Matter to be within its Authority, it must be taken to be out of it. Mr. Parker took another Exception, viz. That the whole Rate could not be quashed at the Complaint of one Man; and so that the old Rate, however just at first, might be unequal now, and therefore the Justices could not make a standing Rate; which last suit concessum per Holt C. J. for Lands may be improved. By 43 Eliz. the Rate must be equal; ergo it ought to be continually altered, as Circumstances alter. The Justices could not confirm an old Rate, and in this their Order is nought: And to him it was said in this Case, That tho' the Justices at Sessions need not give a Reason for their Order; yet if they give a Reason which is wrong, we must be guided by it, and quash the Order, because it appears to us to be no Reason.

Inter The Inhabitants of Mynton *and* Stony-Stratford.
Mich. 13 Will. III. B. R.

BY Order of the Justices a poor Person was sent to Mynton: Mynton appealed to the Sessions, and the Order was discharged; and then by Order the Person was sent to Stony-Stratford, who appealed, and the Order was confirmed; and then by another Order the Person was sent back to Mynton. Et per Curiam, The last Order to send him to Mynton was illegal. Per Holt C. J. If on Appeal to the Sessions an Order be discharged, that Judgment binds only between the Parties. But when upon an Appeal an Order is confirmed, that is conclusive to all Persons as well as to the Parties, for 'tis an Adjudication that this is the Place of the Party's last legal Settlement, which cannot be avoided by the Parish against whom it is made. It was also held, That a Parish in Reputation is liable, if there be Officers, i. e. Church-wardens.

(9.)
Reversal on Appeal is final only between the Parties, but Confirmation is conclusive against all the World.
Vide ante, Pa. 486, &c. lb. & Pa. 524.
1 Vent. 310.
Vide ante 492, 524.
5 Mod. 417.
6 Mod. 269.
287.

Cases B. R. 668. S. C. 3 Salk. 260. Ser. and Rem. 228. Holt 577.

Anonymus. Pasch. 1 Ann. B. R.

Hospital Lands are chargeable to the Poor as well as others; for no Man, by appropriating his Lands to an Hospital, can discharge or exempt them from Taxes to which they were subject before, and throw a greater Burthen upon their Neighbours. Per Holt C. J.

(10.)
Hospital Lands are chargeable to the Poor.

Inter The Parishes of Farringdon in Berks *and* Witty in Oxfordshire. Pasch. 1 Ann. B. R.

Post, pl. 13.
S. C.
Ser. and Rem. 181.
Holt 577.

A Servant came into the Parish of S. was hired for a Year, and having served half a Year of the Time, married a Woman in the Parish of Witty; and the Question was, 1st, Whether the Justices on Complaint of the Church-wardens could make an Order to remove him to the Place of his last legal Settlement? 2dly, Whether his serving here would not gain a Settlement? To the first Point it was admitted, That the Contract between the Master and Servant was not dissolved by the Marriage; and that admitting it might be dissolved by an Order made on Complaint of the Master, yet without that, and upon Complaint of the Officers only, it could not be dissolved; therefore Broderick (of Counsel) admitted that the Justices could not in the principal Case so remove him, as that he could not come to serve his Master, but held he might be removed, so as that the Order should not disturb him, and prevent a Settlement; and this he said was a Medium

(11.)
Unmarried Person hired for a Year, marrying before the Year is expired, cannot be removed, and performing the Service, gains a Settlement.
Vide ante, pl. 6.

dium that would neither prejudice the Contract, nor evade the Statute. He compared it to an Order to remove on 14 Car. before forty Days Stay; in which Case the very making of the Order obstructed a Settlement; and it may be executed after the forty Days. Holt C. J. and Powell contra, That an Order to disturb him and not remove him, was not within the Meaning of the Act; disturbing him, without Power to remove, is vain and this does not unsettle, nor is it like the Case of forty Days. 2dly, It was questioned, Whether such a Stay, &c. would gain a Settlement; because the Statute makes the Party's being unmarried a Qualification as well as his Stay, viz. If any such Person, being unmarried, being hired, &c. Such Service, &c. So that the Words such Service goes to all, not only the Stay but the State of the Party. To this Powell inclined; Holt C. J. contra, Such is only such Service, and the Marriage does not hinder the Service; the Contract continues; and suppose the Woman he marries be of the same Parish, shall not that gain a Settlement?

Inter The Inhabitants of the Parishes of Cumner and Milton in the County of Berks. Trin. 1 Ann. B. R.

(12.)
Father settled at A. removes to B. with his Children, and gains a new Settlement there, and so do the Children, tho' under the Age of seven Years.
Vide ante 427, 470. Comb. 380, 381. 3 Salk. 259. S. C. 6 Mod. 87. Holt 578. Set. and Rem. 239, 242.

UPON a Special Order of Sessions the Case was, H. settled at Cumner, and had several Children born there. Afterwards he removed to Milton, and gained a Settlement there, by renting a Tenement of the Value of 10 l. per Annum. He became poor, and his Children under the Age of seven Years were sent back to Cumner, by Order of two Justices, which was confirmed at the Sessions. Powell J. held, That when a Child is sent with the Parents by reason of Nurture, it gains no Settlement; but here the Children did not come to Milton by Order. The Children's Settlement shall not be divided from the Father for that would be unnatural. When a Man gains a Settlement himself, his Wife and Servants, he shall gain a Settlement for his Children also; but if a Widow having Children under the Age of seven Years, marries a Man of another Parish, the Children shall go with the Mother for Nurture, but after seven Years of Age they shall be sent back to the Parish where their Father was settled for she cannot gain a Settlement for them in this last Parish, being under Coverture, and having a Settlement there herself only as Part of her Husband's Family, from whom she cannot be severed. Holt C. J. Birth is a Settlement, and the first Settlement; and there must be another second Settlement by forty Days, &c. to alter the primary Settlement. A Child under the Age of seven Years is accounted a Nurse-Child. If a Child put out to Nurse, or for Education, tho' it be above seven Years

old, it gains no Settlement thereby, as it was held in Sir Paul Jenkinson's Case. The Question here is, Whether the first Settlement by Birth be altered? It is hard, I confess, to remove the Child from the Father. Gould J. The Child may be removed after the Age of seven Years, but not before; he is sent with his Father for Nurture only. Holt C. J. Suppose the Father and Mother come to A. and then go to the Parish of B. and within forty Days the Mother be delivered of a Child; the Child, tho' legitimate, shall be settled where it was born. The principal Case is fit to be well considered; the Father indeed ought to maintain his Children, but the Question is, Whether the Children by living with the Father gain a Settlement? The Justices cannot remove the Children from the Father till he fall into Decay. Afterwards this was moved again. Et per Holt C. J. The Question is, When the Father comes with his Children to Milton, and gains a Settlement there, whether that does not also give a new Settlement to his Children, and unsettle them as to Cumner, the Place of their Birth? If a Father be settled and die, his Wife being big with Child, and after that the Mother dies before she is delivered, and afterwards the Child is born, the Child is settled there by his Birth. In this Case the Settlement of the Father at Milton, is a Settlement to the Children. The Child is settled by Birth only, where 'tis an accidental Settlement. The Order was quashed.

Inter The Parishes of Farringdon and Wilcor.
Pasch. 2 Ann. B. R.

Ante, pl. 11.
S. C.

H. Being single, was hired for a Year; after he had served three Quarters of the Year he married, and the Justices removed him to his Place of last legal Settlement. Et per Cur, The Contract being good, the Justices have no Power to remove him from his Master before the End of the Year; for they cannot annul the Agreement between Master and Servant, unless it be upon Complaint of the Master. Settled or not settled, was not before the Court. But as to that, viz. Whether such Person serving out the Year would gain a Settlement? Holt and Gould held, The Word unmarried went only to the Hiring. Cowell contra, That it went to the whole Service, by reason of the Word such.

(13.)
Unmarried
Person hired
for a Year,
marrying be-
fore the Year
expired, but
performing
the Service,
gains a Set-
tlement.
Vide ante,
pl. 6.

Inter

Inter The Parishes of Little-Kire and Woolfall.
Trin. 2 Ann. B. R.

(14.)
Certificate-
man is not
removeable
till actually
chargeable.
Vide infra.

A Parishioner of the Parish of A. came to B. with a Certificate, according to the late Act of Parliament; and the Justices reciting that Matter, and because he was likely to become chargeable to B. sent him back to A. Winnington moved to quash the Order, because he is not removeable till he is actually chargeable by the express Words of the Act 8 & 9 W. 3. c. 30. Et per totam Curiam the Order was quashed, nisi. Mr. Broderick agreed the Exception, but said the Reason of the Removal was because the Certificate was wrong, and that the Sessions had Authority in this Matter; for an Appeal lies to them within the Equity of 14 Car. 2. where a Certificate is made and signed by two Justices. Powell J. contra. If there was a Fault in the Certificate, it ought to appear to be the Reason why he was sent back, and the Justices at Sessions have not a Jurisdiction to stay of Appeal upon such a Certificate.

Inter The Inhabitants of Malden and Fletwick.
Trin. 2 Ann. B. R.

(15.)
Order of Re-
moval of
Certificate-
man must ad-
judge him
to be actually
chargeable;
ut supra.

AN Order was made reciting, That whereas Complaint had been made unto us by the, &c. that J. S. who is lately come into the Parish of, &c. with a Certificate according to 8 & 9 W. 3. is actually chargeable to the Parish, and quashed; for the Justices must adjudge him to be chargeable, or at least must say he appeared to them that he was so; but the Justices need not adjudge the Place that gives the Certificate to be the Place of his last legal Settlement.

Inter The Parishes of All-Saints and St. Giles in Northampton. Trin. 1 Ann. B. R.

(16.)
Certificate
concludes
the Parish
giving it,
only against
the Parish
to which it
is given.
Vid. post 535.
Case of Ho-
niton contra.
Holt 578 S.C.

UPON an Appeal a Special Order was made, and the Certificate was; One was born at A. and came and lived at B. for many Years, but never gained any Settlement there; then he removed to C. for Convenience of getting his Livelihood, and B. gave him a Certificate according to the late Act. The Man became chargeable, and was sent back to B. who found that he was last legally settled at A. and sent him thither. Et per Holt C. J. The Reason of the Act of Parliament about Certificates, was only to encourage Parishes where poor Persons were minded to go, to

ceive them; and therefore it enacts, That when the poor Person shall be chargeable, the Parish which gave the Certificate shall receive and provide for him as a settled Inhabitant, which Words lay an Obligation upon the Parish which gave him the Certificate to receive and provide for him against that Parish which they gave the Certificate to. But as to all other Parishes, they are as they were before, for the Conclusion is only by reason of the Words of the Act of Parliament, which extend only to the Parish to which he was sent; by Consequence the Conclusion can extend no farther. Powel J. This Way of giving Certificates was a Thing commonly practised before this Act of Parliament, and it was made only to oblige the Parish who gave the Certificate to receive him again of the other Parish to which the Certificate was given: But the Intent of that was not to make a new Settlement which was not before. But per Holt C. J. Such Certificate is a mighty Evidence before the Justices; and so is a Demand and Refusal of a Conversion, which yet being specially found, will not be a Conversion.

Tawny's Case. Hill. 2 Ann. B. R.

TAWNY being Overseer of the Poor of Little-Port in the Isle of Ely, laid out his Money in the Relief of the Poor, and was turned out of his Office by the Justices, before the End of the Year, by which means he lost the Opportunity of making a Rate to re-imburse himself: Upon this he obtained a Mandamus directed to the Church-wardens and Overseers of the Poor, to make a Rate to re-imburse him; Mr. Parker and Mr. Eyre argued, That there could be no such Charge, neither by Common Law nor by the Statute 43 Eliz. Et per Holt C. J. We cannot order the Parish or Overseers by a Mandamus to make a Rate to raise Money to re-imburse an Overseer, but only to raise Money for the Relief of the Poor, nor can they make a Rate otherwise: The Act of Parliament is expressly so, and must be pursued: An Overseer is not bound to lay out Money till he has it; if he does, he must make a new Rate for the Relief of the Poor, out of that he may retain to pay himself: Tawny should have done so; he trusted where he needed not have done it; he has not pursued the Means the Statute gave him, and we cannot relieve him. Et per tot. Curiam, The Mandamus lies not; ideo cassetur. nota per Cur', The Church-wardens and Overseers may make a Rate of themselves. Weld and Page pro le Mandamus.

(17.)
No Mandamus lies to the Overseers to make a Rate to reimburse former Overseers.
Vide pag. 484. & ante pl. 5.
5 Mod. 179.
6 Mod. 97.
S. C.
3 Salk. 232.
Cases L. E. 104.
Holt 579.
Rate must be for the Relief of the Poor.
Ante pl. 3.

*Inter The Parishes of Westbury and Coston. Hill.
2 Ann. B. R.*

(18.)
Bastard born
at A. pending
an Order of
Removal
from B. after-
wards rever-
sed, is set-
tled at B.
Vide ante
427, 485, &
528.

A Woman big with Child was removed by Order of the Justices from Westbury to Coston, and pending the Order before the next Quarter-Sessions, she was delivered of a Bastard Child: Coston appealed, and thereupon the Order of the Justices was reversed; but the Child was sent back to Coston as the Place of its Birth. Et per Holt C. J. Tho' here be no Fraud, here was a wrongful Removal, and the Reversal makes all void ab initio: Fraud, or not Fraud, is not material in this Case; but the Settlement of the Child depends upon the Removal, for if that was wrong, they shall not ease themselves by it.

*Tracy versus Talbot. Trin. 3 Ann. Coram Holt C. J.
At Nisi Prius.*

(19.)
Assessments
for the Poor
ought to
be raised
monthly.
6 Mod. 214.
S. C.
3 Salk. 260.
Set. and Rem.
235.
Holt 581.

H. Took Part of a House in the Parish of D. on the 3d Day of Decemb. and was rated as an Inhabitant, and was distrained for a Quarter's Rate the Christmas following; but the Distress was taken before Christmas on a general Warrant made for the whole Year; and in Replevin upon Evidence it was ruled per Holt C. J. 1st, That if two several Houses are inhabited by several Families, who make and have but one common Avenue or Entrance for both; yet in respect of their Original, both Houses continue rateable severally, for they were at first several Houses; and if one Family goes, one House is vacant: But if one Tenement be divided by a Partition, and inhabited by different Families, viz. the Owner in one, and a Stranger in another, these are several Tenements, severally rateable, while they are thus severally inhabited; but if the Stranger and his Family go away, it becomes one Tenement. 2dly, That H. could not be rated for the whole Quarter, for Poor's Rates are to be assessed monthly by the Statute; and by this Means a Man cannot move in the Middle of a Quarter, but he must be twice charged. 3dly, That H. could not be distrained by Virtue of the general Warrant made before the Rate; but there ought to be a special Warrant on purpose. 4thly, That a Distress could not be taken for a Quarter's Rate before the Quarter was ended; but the Jury said the Custom was otherwise.

Domina Regina *versus* Hedges. Mich. 4 Ann. B. R.

AN Order was made at the Quarter-Sessions upon Appeal: (20.)
 The Case was, Hedges, an Overseer of the Poor, account- Upon Appeal
 ed before two Justices, and this Account was allowed; the Pa- from Allow-
 rish appealed to the Quarter-Sessions from this Allowance, and ance of O-
 they disallowed the Account, and ordered him to pay so much verseer's Ac-
 over, which they adjudged to be in his hands; and for not doing counts, Ses-
 this, they committed him. Mr Eyre moved to quash this Order, sions must
 because by 43 Eliz. c. 2. sect. 4. they should have levied the Ar- execute their
 rears by Distress and Sale, and in Default of Distress have com- Judgment in
 mitted him: And the whole Court agreed, That the Justices at the same
 the Sessions upon the Appeal must execute their Judgment in the Manner as
 same Manner as the two Justices must do, and that the two Ju- two Justices
 stices must have sent their Process to distrain, and upon a Re- ought to do.
 turn to that, that there was no Distress, should have committed Vide ante
 him. Then Darnel moved that it might be only quashed as to this 525. pl. 5. &c.
 Part: Quod fuit concessum per Cur'. Then Mr. Eyre objected to ib. & 6 Mod.
 that, viz. That the first Order, as recited in the Order of Ap- 77. 97.
 peal for the Allowance of the Account, was not by two Justices
 Quorum unus; sed non allocatur; We cannot judge of that upon
 a Recital, so as that you may take Advantage of it; you must
 bring in that Order by Certiorari.

Inter The Parishes of St. Bride's and St. Saviour's.
 Hill. 4 Ann. B. R.

A Poor Person was sent from St. Bride's in London to (21.)
 St. Saviour's in Southwark, and upon an Appeal a special Apprentice
 Order was made: The Case was, B. was bound Apprentice for may gain a
 four Years to J. S. and lived out these four Years at St. Bride's Settlement,
 with him; J. S. was only a Lodger and had no Settlement there. tho' the Ma-
 And the Court held the Apprentice was well settled in St. Bride's, ster has none.
 for he was not a Person removeable, nor does his Settlement Ant. 497. pl.
 depend on his Master, as that of a Wife on her husband for a 28.
 Settlement; but he gains a Settlement for himself within S. C. Ser. and
 4 Car. 2. by forty Days Inhabitation, and so of a hired Ser- Rem. 87.
 vant; but the Matter went off upon another Exception.

Jenkin's Case. Pasch. 5 Ann. B. R.

(22.)
Order to re-
lieve his Fa-
ther till Ses-
sions order
the contrary,
good.

AN Order of Sessions was made, that the Defendant should pay 2s. per Week towards the Support of his Father, till that Court should order the contrary; which was held good, because it was indefinite and no set Time limited; and if an Estate happened to fall to him, they might apply to the Justices; otherwise if a Time was limited.

Domina Regina *versus* The Inhabitants of Buckingham
Pasch. 5 Ann. B. R.

(23.)
Nothing
makes a Set-
tlement
within 3 &
4 W. & M.
that is not
within the
very Words.
Vide ante
478, 523,
524. post 536.
1 Show. 12.
Comber. 282.
5 Mod. 330,
331, 454
S. C. Holt
582.
Set. and Rem.
143.

A Special Order was made, wherein the Case was; H. being a poor Person went to Buckingham, where he took Part of a House of W. T. at 3 l. per Annum, and insisted when he took this Apartment, that he would pay no Taxes for it, but that the Lessor should; this was agreed to, his Rent being the more and the greater upon that Account: This appeared upon Evidence and also that this Apartment before the Taking, and while he continued in it, was distinct from the rest of the House without Communication, and was taxed as a House of it self, and that the Tax was laid upon W. T. the Lessor; and that while H. lived there he took his Freedom in the Corporation, and once voted a Freeman at the Election of Bailiffs for the Corporation. The Justices at the Quarter-Sessions adjudged this to be a good Settlement: But upon the Motion of Serjeant Broderick was quashed: He insisted that since the explanatory Act 3 & 4 W. & M. nothing makes a Settlement within that Statute that comes not within the Words; an explanatory Act implying a Negative of any Thing else. Et per Holt C. J. and Powell J. Coming into a Parish and being taxed by the Parish, made a good Settlement without a Notice in Writing, within the Statute Jac. But the Law is altered by 3 & 4 W. & M. and as to his Voting they could not take Notice that that implied a Settlement for a bare Residence might, by the Constitution of the Corporation, intitle him to that, and his Voting was an Act that related to the Corporation, and not to the Parish.

Inter The Inhabitants of the Parish of Dunsfold and
Ridgwick. Mich. 9 Ann. B. R.

It appeared by a special Order, that one was hired as a Ser-
vant to live at Ridgwick for Half a Year, and after that was
hired again to live there for another Half Year with the same Per-
son, and thereupon served a Year in one continued intire Ser-
vice, but by several Hirings: Sir Peter King urged, That here
was a Service for a Year, and a hiring for a Year, tho' by seve-
ral Contrasts; and that the Hiring need not be by one intire
Contrast, and that so it had been held; and he cited a Case, where
one took a Tenement of 5 l. a Year, and also another Tenement of
1 l. a Year, and occupied both, and this was held to be a Rent-
charge of a Tenement of 10 l. per Annum. Et per Cur', It ought
to be one intire Contrast, and one intire Service; the one is re-
quired by the Statute as well as the other. If a Service un-
der several Contrasts shall gain a Settlement, one that serves by
the Month, by the Week, or by the Day, may, if he continues a
Year, gain a Settlement; one may hire by the Day for Charity;
but there is Danger of being chargeable in hiring such a Person
for the Year: For such a Term as a Year it is not supposed a
Master would hire one, unless able of Body, and so a Person not
likely to become chargeable. Also the Chief Justice observed,
that by the Statute of Eliz. the Retainer of Servants was for
a Year; that 14 Car. 2. requires forty Days Stay, and that
this was inconvenient, for by gaining a Settlement in forty
Days, Servants grew insolent; and that these latter Acts, viz.
4 W. 3. c. 11. 8 & 9 W. 3. c. 30. do but turn the forty Days
service into a Year's Service, and the Hiring to be a Retainer
for a Year according to the Statute of Eliz.

(24.)
Two several
Hirings for
Half a Year,
and Service
for a Year,
not sufficient
to gain a Set-
tlement.
Black 191.
S. C.

Inter The Inhabitants of the Parish of Honiton and
St. Mary-Axe. Mich. 9 Ann. B. R.

Vide ante
530. con.

One came to Honiton with a Certificate from the Parish of
A. after this he went to the Parish of B. and now being
settled at the Parish of A. the said Parish offered to prove that he
was settled at the Parish of St. Mary-Axe; and the Question
was, Whether A. was bound by the Certificate as to Honiton
or concluded as to all Parishes whatsoever? Et per Cur',
before the Statute a Certificate was only an Evidence of a pri-
vate Undertaking between the Parishes, in the Nature of a Con-
tract; but now 'tis a solemn Acknowledgment, like the Conu-
sation of a Fine: And thereby the Party is owned to be legally
settled

(25.)
Certificate
concludes
the Parish gi-
ving it, as to
all the World.
Black 192.
S. C.
Cases L. E 9.
Vid. the Case
of St. Giles's
in Nor-
thampton.
ante Pl. 16.
contra.

settled there, and that they will provide for him; and as all other Parishes on this Certificate are bound to receive him, so the Parish that certifies is concluded as to all other Parishes. And there is no Reason why it should differ from an Adjudication, since this is the Acknowledgment of the Parish signed by the proper Officers, and made before two Justices of Peace, who are proper Judges, and upon less Evidence could have adjudged it a Settlement, by which Sentence all Parties would be bound, and there is no Remedy but to repeal it.

Inter The Parishes of Evelin in Oxfordshire and Rencomb in Gloucestershire. Hill. 10 Ann. B. R.

(26.)
Renting a
Mill of 10 l.
per Annum
gains a Set-
tlement.

Vide ant. 492, 524. 1 Show. 12. Faresl. 54. 5 Mod. 419.

AN Order was drawn up specially to have the Opinion of a Court, Whether renting of a Water-Mill of 10 l. per Annum would make a Settlement? Et per totam Curiam clear a Mill is a Tenement, and the Renting thereof must gain a Settlement within the Statute.

Inter The Parishes of Gatton and Milwich. Hill. 10 Ann. B. R.

(27.)
Parish Clerk
nominated
by the Parson
is in for Life,
and gains a
Settlement.
Vide ante
478. 523.
1 Show. 12.
Shaw, P. L.
223. S. C.
Set. and Rem.
158.

AN Order was drawn up specially for the Opinion of a Court; and the Question was, Whether one appointed Clerk of the Parish by the Parson, and executing the Office of a Poor, should gain a legal Settlement within 3 & 4 W. & M. which the Words are, viz. shall execute any annual Office or Charge? For it was objected, that this was not an annual Office. Mr. Lechmere contra: The Intent of the Act was, that no Office under an annual one should gain a Settlement, and *in se minus*. On the general Nomination to the Office of Parish-Clerk he is in for Life. Powell J. His being in by the Parson makes no Difference, no more than where a Constable is put in by the Leet, and not by the Parish; 'tis more than an annual Office, he is not removeable and has Fees. Powell J. He is but a Servant to the Person at Will: Where he comes in by Election, he has an Estate for Life by the Custom, but there is no Deed or Writing: How can he have an Estate for Life in this Office? Powell J. At that Rate he has not an Office at Will for a Man cannot have an Office at Will without Deed. The Office of Church-warden was by Common Law, and yet that for a Year without any Deed or Writing. So 'tis of a Parish Clerk, he is by Common Law an Officer, and is in for Life without Deed; so ruled *absente* Parker C. J.

P O W E R S.

Winter *versus* Lovedore. Mich. 9 Will. III. B. R.

IN Ejectment a Special Verdict was found, That G. P. was seised of the Manor of M. and on the Marriage of his Son, settled the said Manor to the Use of himself for Life, Remainder to his Wife for Life, Remainder to his Son in Tail, with a Proviso, That he should have Power during his Life, and so the Wife after him, to demise the Premises in Possession, for one, two, or three Lives, or in Reversion for one, two, or three Lives, or thirty Years, or for any Number of Years determinable on one, two, or three Lives, so as such Demise be not of the Demesne Lands. G. P. reciting that J. S. and his Wife held a Copyhold Tenement for Life, demised the said Copyhold Tenement to the Lessee for thirty Years, to be, after the Death, Surrender, or Forfeiture of J. S. and his Wife; and the Question being, Whether this Lease of a Copyhold was pursuant to, and warranted by the Power? It was held in this Case by Holt C. J.

1st, That any Lease, to commence in futuro, is in some Sense a Lease in Reversion, as it is opposed to a Lease in Possession; but a Lease within such a Power must be construed of a Lease to commence in Possession after another Lease or Interest already created before the Reservation of the Power and not after; and that a Lease to commence after any other Lease, is properly a Lease in Reversion; but that a Lease for Life, to commence after another Lease in Being, is a concurrent Lease; because a Freehold cannot expect, but must commence in Possession presently; however, this may be said to be a Lease in Reversion within such Powers.

2dly, That G. P. might make a Lease in Reversion absolutely for thirty Years, by Virtue of this Power, because the Limitations and Restrictions are disjoined, and the latter Part is carried on by Way of Enlargement of the Power; to which Turton and Eyre agreed, Rokeby dissentiente.

3dly, That this Lease was void, because it was of Copyhold Lands; for by a Grant of the Demesnes the Copyholds will pass; and by the same Reason, by excepting the Demesnes the Copyholds

Lutw. 1464.
4 Mod. 265.
1 Mod. 318.
6 Co. 33.
8 Co. 70.
4 Co. 70.

S. C. 5 Mod.
244, 245,
378, &c.
Vid. 6 Mo. 20.
Cases B. R.

147.
Holt 414.
(1.)

Power to demise any Lands, except the demesne Lands of the Manor. Copyholds are within the Exception.

Vid. Ray.
132.
Pop. 9.
Yelv. 222.
Moor 494.
2 Lev. 60,
149, 150.
1 Lev. 150,
241.
Carth. 427.
S. C.
1 Inst. 54.
Comb. 371.

holds are excepted; and the rather, because the Power is derived out of the Inheritance, and the Tenant at Will by his Leases might destroy the Copyhold, which is unreasonable; and if there were nothing else for the Power to work upon in this Case, he may by Virtue thereof demise the Rents and Services.

Lord Kilmurry *contra* Geery. Pasch. 12 Ann. In Canc.

(2.)
Power to
charge Lands
with a Sum
of Money,
imports In-
terest there-
of also.
Vide Chan.
Rep. 18, 23,
281, 363, &c.
Eq. Ab. 341.
p. 4. S. C.

IT was held, That if a Man has Power to charge Land with any Sum not exceeding the Sum of 3000 l. he may charge it with 3000 l. and the Interest besides; for the Intention is to charge the Premises with 3000 l. principal Money, and that of Course carries Interest, and none would lend such Sum on such Security, if the Law were otherwise.

P R E S C R I P T I O N

Star *versus* Rookesby. Mich. 9 Ann. B. R.
Vide *Title Fences*, Vol. 1. pag. 335.

Presentation, Admission, Institution, Induction.

Vide Hob.
302.
3 Leon. 47.
6 Co. 57.
1 Leon. 230.
2 Ann. 49.
Cro. El. 518.

Hele versus The Bishop of Exeter. Mich. 3 W. & M. B. R. 3 Lev. 313.
S. C.
4 Mod. 134.
2 Lutw. 1094. Parliament Cases 88. Nel. Lutw. 348. Carth. 311. Holt 609.

IN Quare Impedit the Bishop pleaded, That the Church became vacant on the 15th Day of April, and that the Plaintiff presented to him on the 19th Day of May following one Hodder; That he examined Hodder, and found him personam minus sufficiens in literaturâ, ac eâ ratione fore personam inhabilem & minimè idoneam ad habend. beneficium cum curâ animarum, and therefore refused him on the 20th Day of June, and gave the Plaintiff Notice; and because no other was presented within six Months after the Avoidance, he collated the other Defendant (the Incumbent) who was instituted. The Incumbent pleaded to the same Effect. The Plaintiff replied, That Hodder, at the Time of his Presentation, was Vicar of another Church: That he was Homo literatus, and in Priests Orders: That he was licensed to preach; and had celebrated Divine Service many Years, and was sufficienter literatus to celebrate the same. There was a Rejoinder and Surrejoinder, (which were laid out of the Case) and thereupon a Demurrer. Et per Cur' 1st, The Ordinary must examine in convenient Time, and after that refuse in convenient Time; if he does not, he is a Disturber by his Delay. 2dly, If the Ordinary refuse, quia criminofus, he need not give Notice of his Refusal, for the Crime is as much in the Avoidance of the Patron as of the Bishop, and in that Case the Lapse shall incur from the Avoidance; but if he refuse, quia illiteratus, he must give personal Notice, and the Lapse shall incur from the Refusal. 3 Cro. 119. 1 Lev. 31. Dy. 327. 2 Ro. 364. 3dly, That the Ordinary might well refuse him now, as unfit for this Cure, tho' he had been allowed for a former. 4thly, It was not determined what Learning was necessary: While the Liturgy was in Latin, that Language was undoubtedly necessary; now indeed the Liturgy is in English: But it was observed that Eliz. c. 12. requires a Clerk should be able to answer his Ordinary, and give an Account of his Faith in Latin, according to the Articles. 5thly, The Court held this Pleading too general, because

(1.) Where the Ordinary refuses quia insufficiens in literaturâ, he must shew in what Particular.
Vide 5 Co. 57, 58.
1 And. 189, 190.
3 Leon. 198, 199, &c.
Cro. El. 242.
Hob. 296.
Carth. 311.
2 Lutw. 1094, &c.

Ordinary may examine and refuse; but it must be in convenient Time.

Must give Notice of his Refusal, if it be quia illiteratus; secus if criminofus.

because it was not shewn what Learning he was defective in whereas it ought to be certain, because it is traversable; and if the Clerk die, to be tried by a Jury, and the King's Courts to judge of it; and the Law will the rather require a Certainty, because this Answer is to disable a Man in his Profession, and preclude him of a Freehold. Judgment was given for the Plaintiff.

S. C. 3 Lev.
382, &c.

4 Mod. 190.

1 Show. 501,

441, 493, 413. Comb. 301. Holt 585.

Dominus Rex & Domina Regina *versus* The Bishop of London and Dr. Birch. Mich. 7 W. III. B. R.

(2.)

Where a new Advowson is created by Statute, it is subject to the same Rules of Law and Prerogatives of the Crown as an old one.

IN a Quare Impedit against the Bishop of London and Dr. Birch for hindring to present to the Parish Church of St. James's the Declaration set forth, That St. Martin's in the Fields being a great Parish, an Act of Parliament was made 1 Jac. 2. to take the Parish of St. James out of it, and make it a Parish of itself with Cure of Souls, and Dr. Tennison, who was the Vicar of St. Martin's, the first Rector; and appointing the Patronage, after the Death of Dr. Tennison, to the Bishop of London and his Successors, and the Lord Jermyn and his heirs alternately: Virtute cujus Dr. Tennison was first Rector, and being so, was afterwards made Bishop of Lincoln; whereupon it belonged to the King and Queen to present by Prerogative; to this the Bishop demurred, and Dr. Birch pleaded the Statute of 25 H. 8. and that by Virtue of the said Act, the Archbishop of Canterbury gave Dr. Tennison a Dispensation to hold this Church in Commendam; which the King confirmed, from the 22d Day of October till the first of July following, &c. To this the Attorney General demurred. 1st, It was objected for the Defendant that this Prerogative was unreasonable; but the Court answered, That since the King made the Church void, it was no matter that he should be allowed to fill it; and the Patron was not much hurt, for it was only one Life exchanged for another and Sir Giles Eyre held, That if a Parson be promoted to be Bishop, the Church was void by the Common Law; but the Reason of it was not from the Incompatibility, because originally the Bishop was incumbent of the whole Diocese, and sometimes the Cure by others; and the Court did admit that the Crown did not anciently exercise this Prerogative, but the Pope did by Usurpation; and that notwithstanding the Statute of Provision 25 E. 3. the Pope would collate if the Incumbent was made Bishop, 4 E. 3. 5. Owen 144. Then 7 H. 7. c. 8. was made against Provisions; but notwithstanding that the Pope was on. Vide Cotton 458. Mo. 399. 3 Cro. 5, 6. Owen 14 Win. 94. 2 Cro. 691. Dy. 228. which was but a sudden Denial.

Before the Reformation the Pope presented upon Promotion of the Incumbent.

2dly, They held, that the King's Turn was not served by confirming the Commendam; for the Dispensation was only to save the Avoidance, and the Confirmation continued the Possession, but transferred no Right.

3dly, This being a new Patronage created by Act of Parliament, not in esse before, which appoints a particular Person to have the first Turn after the next Avoidance; it was objected, That no Body could say the King should present, when the Act said otherwise; and this was therefore a Case exempt from the Perogative: But the Court held, that the Act did not interfere with the Perogative. If an Estate-Tail is created by Act of Parliament, it is subject to such Bars as other Lands intailed are. The Wife shall be endowed of a new Estate. Vide 8 Co. The Prince's Case; à pari ratione a new Rectory shall be subject to the King's Perogative.

4thly, It was objected, That this new Church, as to D^y. Tenison, was a kind of Donative, he coming in without Institution and Induction, and that the presentable Parsonage does not commence till after him, by the Words of the Statute; and that in Case of a Donative, the Promotion of the Incumbent does not make a Cession.

Sed Curia contra: For in Point of Estate, the Right of Presentation commences by the Passing of the Act immediately; but in Point of Interest, not 'till the Avoidance. Vide 3 Cro. 323. 10 Co. 107. 4 Mod. 190. Shower 164. 3 Lev. 352. S. C.

Ladd *versus* Widdows. Mich. 1 Ann. B. R.

UPON a Motion by Serjeant Selby for a new Trial in a Quare Impedit, wherein the Point in Issue was, Whether the Church was Donative or Presentative? Evidence was produced of several Presentations; and the Court, viz. Holt C. J. and Powell J. held, That tho' a Presentation might destroy an Impropriation, yet it could not destroy a Donative, because the Creation thereof was by Letters Patent, whereby Land is settled to the Parson and his Successors, and he to come in by Donation.

(3.)
Presentation
may destroy
Impropria-
tion, but not
a Donative.
Holt 259. S. C.

Vide 1 Lev.
204.
Hale's P. C.
215 to 225.
Hawk. P. C.
310, 311, &c.

Principal and Accessary.

Domina Regina *versus* Nash. Mich. 1 Ann. B. R.

(1.)
Who is an
Aider and Af-
fister in Deer-
stealing with-
in 3 & 4 W.
& M. c. 10.
N. B. Farcll.
129 to 137.
Vide Cro.
Car. 340.

Vide Kely.
32, 33.
7 And. 116.

UPON a Conviction of Deer-stealing by Justices of Peace on the late Statute, the Question was, Whether or not present, but procuring, advising, and abetting, lending his Gun, Dog, &c. before the Fact, should be said to be aiding and abetting therein? Holt C. J. inclined 1st, That he was not within the Words, not being actually present at the Fact, because the Statute is to be construed strictly for that it takes away the Privilege of a better Trial, viz. per pares. 2dly, Because it adds a farther Penalty to what was an Offence before: He said there might be an aiding and abetting before the Fact, viz. by Advice, &c. or in the Fact, by being present; or after the Fact, by abetting the Party. Vide Dy. 18 Co. Ent. 56. The other Judges held Aiders in the Fact would be Principals, and then Aiders and Abettors would mean nothing. Quod Holt negavit, saying, All that are present may be said to be Principals as to an Action of Trespass, but not as to the Penalty of this Statute: And this Diversity is apparent in other Cases, for one aiding and assisting upon the Statute Stabbing shall have his Clergy, whereas a Principal shall not so in the Case where two went to break a House, one broke and enter'd, the other stood upon the Ladder and received the Goods; he that stood upon the Ladder shall have his Clergy and the other shall not, being a Principal.

Domina Regina *versus* Whistler. Hill. 1 Ann. B. R.

(2.)
Where Sta-
tute makes
an Offence
Felony, Ac-
cessaries (pro-
perly) are
within it,
though not
named; o-
therwise
where it
makes a par-
ticular Fact

ROLFE and others were convicted of Deer-stealing upon 3 & 4 W. & M. c. 10. and that Whistler was illicite injuste auxilians & assistens præfat. Rolfe, &c. in illicita & justa venatione & occisione Damæ præd. viz. persuadendo & intendendo præfat. Rolfe to kill the same Deer, and lending Dogs to hunt and kill, and Horses to carry away the said Deer, contra formam Statuti; and whether this was an aiding and assisting within the Statute, was the Question. Powell, Powys & Gould

more penal. Far. 129. S. C. Rep. A. Q. 25. Holt 215.

Gould, Justices, held that it was; but Holt C. J. contra held, that the Condition ought to be quash'd; for that where a Statute makes that Felony, which was not so at Common Law, Aiders and Abettors, according to the Notion of the Common Law, are within the Statute, tho' not expressed; but where an Offence at Common Law is only made more penal, Aiders and Abettors are not to be understood of such as aid before and after the Fact, but such as are present only: These were only Accessaries at Common Law, and are not within the Act. Vide 1 Cro. 474. 3 Cro. 750. Dal. 11, 22. Postea, in the same Case, Holt C. J. said, he held the same Diversity, with this farther, that this is to be understood when an Offence at Common Law is made more penal by a particular Description of the Fact, and not under a general Denomination of the Crime; as if this Statute had enacted these Penalties on them as Trespassers, as 'tis done by the Statute de Malefactoribus in parcis. Vide 1 And. 116. Hale 51, 216. 12 Co. 86. Vide 1 Salk. 161, 182.

Privilege of Persons.

Vide 3 Lev. 343, 393. Lurw. 196, 197, 641, &c. Cro. El. 138.

1466. 1 Sid. 319. 2 Sid. 164. 1 Vent. 137.

Kirkham *versus* Wheely. Trin. 7 Will. III. B. R.

TO an Action Qui tam, the Defendant pleaded that he was an Attorney of the Court of Common Pleas, and that Attornies de C. B. were not suable elsewhere: To this the Plaintiff demurred, 1st, Because the Plea is only in the Negative, and no Jurisdiction is given to any other Court. 2dly, Because there is no Defence by Venit, but Dicit only. Per Cur': As to the Plea being in the Negative, it is well enough; for the Privilege is not traversable and triable per Pais, but a Matter of Law of which we take Notice; and venit & dicit, or dicit only, is a sufficient Defence in this Case. 14 H. 6. 4. 19. (1.) Pleas to the Jurisdiction in the Negative is well enough. Ante 30. S.C. Comb. 319. 3 Salk. 282. Cal. B.R. 74. Defence by venit & dicit, or dicit only, is well in Plea to the Jurisdiction. Vide Prox. Casum.

Stephens

Vide Prox.
Casum ante.

Stephens *versus* Arthur. Eodem Termino.

(2.)
Defence.
3 Lev. 182.
1 Lutw. 7, &c.
2 Lutw. 1590.

THE Defendant pleaded to the Jurisdiction thus, viz. *Idem* Arthurus in propria Persona sua dicit, That he is Clerk to a Prothonotary of the Common Pleas; and it was objected, that he did not say *Venit* & dicit. Et per Cur', *Venit* is no Part of the Plea, but dicit begins the Plea; dicit alone summons him to be in Court, and here it appears he is in Custodia.

Lane *versus* Saltmarsh. Hill. 8 Will. III. B. R.

(3.)

AN Attorney de C. B. being sued by Bill in B. R. Buxton moved he might be discharged: Denied per Cur'; for he him plead his Privilege.

Brown's Case. Hill. 9 Will. III. B. R.

(4.)
Philizers, &c.
3 Lev. 343.
2 Lev. 129.
1 Lutw. 44,
641, 1466.

A Philizer de B. R. was arrested per breve, but discharged on common Bail; for he ought to be sued by Bill, as praesent in Curia. Per Cur', absente Holt C. J.

Branthwait *versus* Blackerby & al'. Hill. 9 Will. III. B. R.

(5.)
For a joint
Cause of
Action a-
gainst an At-
torney with
another Man,
both must be
arrested.
Vid. 1 Saund.
68, 69.
Cases B. R.
163. S. C.

IF a Man hath a joint Cause of Action against two, one an Attorney, and the other not, he must arrest both, and declare against them as in Custody. A Bill cannot be filed against a Person privileged in Vacation, for then he is not present in Court, and as to the Vacation, it begins the last Day of the Term, as soon as the Court rises. (Vide 2 Lev. 129. 1 Vent. 298.)

Note; The Bill must be filed, tho' the Attorney agrees to appear and dispense with it; but it may in such Case be filed afterwards. Pasch. 9 Will. 3. B. R. Robert's Case.

Anonymus. Hill. 2 Ann. B. R.

(6.)
Privilege
cundo & re-
deundo.
Vide Raym. 100. 3 Lev. 343.

HE came to confess an Indictment, and the Court held, that he had no Privilege, *cundo* & *redeundo*, because there was no Process against him.

Dillon *versus* Harper. Trin. 2 Ann. B. R.

S. C. 1 Salk.
328.
Farell. 106.

AN Attorney de C. B. being sued in B. R. pleaded his Privilege; to which it was demurred specially, for not concluding his Plea with a Profert of a Writ of Privilege, testifying his being an Attorney, &c. Et per Holt C. J. The Difference is, if Privilege of an Attorney be pleaded with a Writ, the Defendant cannot be denied to be an Attorney; if without, he may, and then a Certiorari shall be awarded to certify whether he be an Attorney, or not.

(7.)
Where Privilege of an Attorney is pleaded with a Writ, his being an Attorney cannot be denied; otherwise if without.

Scawen *versus* Garret.

TO an Action in B. R. the Defendant pleaded, That he was an Attorney at the Common Pleas: On Demurrer 2d. Ward objected, That he ought to produce his Writ, and conclude with a Prout patet per Recordum; and also that he laid in Venue, alledging no Place where he was Attorney, nor where the Court of Common Pleas sits. Et per Cur', viz. Holt C. J. To which the rest assented, An Attorney may plead Privilege with Profert of his Writ, if he will; or with an Exemplification of the Record of his Admission; or he may plead it as he does here, and it is well enough, for so are the Precedents, and the Plain. 1st may reply Nul tiel Record. Vide 1 Brown. 2. Thom. 4. Cliff 70. Brevia judicialia 169, 172. Cited per Broderick. 3dly, There is no need of a Venue to try where he was Attorney, for it being a Matter concerning his Person, was triable where the Writ is brought: So in Trespass, if the Defendant pleads Son villain regardant, and the Plaintiff replies Frank-home, it must be tried where the Writ is brought. As to the 3d, he wondered how that ever came to be allowed; for that this Court send Writs to the Chief Justice of the Common Pleas by that Name: And unless here this is held to be Part of the Description of a Record, it can never be necessary.

(8.)
Plea of Privilege of an Attorney of C. B. need not shew the Writ under Seal, nor a Venue, nor where the C. B. sits. Vid. 1 Saund. 67. Farell. 97. 6 Mod. 114. 5 Mod. 310. 1 Salk. 6. Holt 587. S. C. Lilly Ent. 3.

Privilege of Jurors, Raym. 113, 144. 1 Lev. 159.

Privilege of the King's Servants, &c. Raym. 152, 180. 1 Lev. 33, 265.

Pri-

Privilege of Place.

Privilege of
the Exche-
quer.
6 Mod. 305.
Ante 511.
Post 550.
pl. 12.
1 Lutw. 46.

PER Walter Chief Baron, the Causes of Privilege in the Exchequer are, 1st, If one be Informer for the King. 2dly, If one be Accountant to the King. 3dly, If one be Debtor to the King. 4thly, Where one is an Officer of the Court, or attends an Officer of the Court. Always where the Plaintiff is privileged, the Suit is by Quo minus; where the Defendant is privileged, the Suit is by Bill. 31 H. 6. 22 H. 6. 19. b.

Superfedeas
to a Suit in
the Exche-
quer, dum-
modo non
tangit nos.

A Writ was delivered to the Barons of the Exchequer open Court, commanding them to stay a Suit between Will and Rookes, by dummodo non tangit nos vel, &c. and the Writ was disallowed, for that the Defendant might have pleaded the Matter to the Jurisdiction of the Court: It was admitted, that there is such a Writ in the Register, but there are several Writs there which no Usage or Precedent does warrant, of which this is one. Et per Walter Chief Baron, Where one intitled to the Privilege of this Court is sued in C. B. this Court sends a Superfedeas; but if it be in B. R. they do not send a Superfedeas for that would be to supersede the King; but the Practice is, to send up the Writ-Book by the puisne Baron, and demand Privilege. Trin. 3 Car. In Scac.

Privilege of the King's Palace, &c. Vide 6 Mod. 73 to 1 Mod. 76. 1 Sid. 211. 1 Lev. 106. 1 Vent. 169. 2 Mod. 133 Inst. 141. Pryn's 4 Inst. 18, 19. Philipp's Regale Necessarium Chap. 1 & 3. 1 Hawk. cap. 21.

Prohibition and Consultation.

Hob. 300,
301.
3 Bulst. 31.

Shorter *versus* Friend. Hill. 1 W. & M. B. R. Rot. 39. S. C. 1 Show.
158, 172.
Vide Raym.
123, 189, 191, 219. Cro. El. 88, 666. Carth. 142. 3 Mod. 283. Comb. 160. Holt 612.

AN Executor being sued for a Legacy in the Spiritual Court, pleaded Payment, and offered to prove it by one Witness, which the Judge refused, and gave Sentence against him. Upon this Matter suggested, a Prohibition was moved for. Et per Cur', 1st, Where the Ecclesiastical Court proceed in a Matter merely Spiritual, if they proceed in their own Manner, tho' that is different from the Common Law, no Prohibition lies; as in Probate of Wills; where, if they refuse one Witness, no Prohibition lies. Noy 12. Ro. 300. 2dly, Where they have Conusance of the original Matter, and an Incident happens which is of temporal Consequence, or triable by the Common Law, they shall try the Incident, but must try it as the Common Law would: Thus in a Suit for Tithes or for a Legacy, if the Defendant pleads a Release or Payment, or in a Suit to prove a Will, if the Defendant plead a Revocation. 1 Ro. Rep. 12. 2 Ro. Rep. 42. Yelv. 92. So in the Case at Bar, they shall try the Matter of Payment or Payment, but then they must admit such Proof as the Common Law would, or otherwise they reject the Cause themselves, and ought to be prohibited. 3dly, A bare Suggestion, That the Defendant has but one Witness, and that they take Exceptions to his Credit and Reputation, is no Cause of Prohibition; for if they admit the Proof of one Witness, whether he be a credible Witness, or not, they shall judge, and the Party has no Remedy but by Appeal. 4thly, That it is not too late to come for a Prohibition after Sentence; for the Sentence in this Case is the Obstacle. Consultation denied.

Starky and The Church-wardens of Watlington in Suffex. Trin. 4 W. & M. B. R.

SUIT in the Spiritual Court for taking away two Bells out of the Steeple, and a Prohibition was granted; for the Church-warden is a Corporation, and the Property is in him, he may bring Trover at Common Law.

Vol. II.

T

Whar-

(2.)
Prohibition
to stay a Suit
in the Spi-
ritual Court for
taking Bells.

See 6 Mod.
11, 12, 25 &
79, 424, 131.
1 Salk. 34, 35.

Wharton *versus* Pits. Trin. 4 & 5 W. & M.

(3.)
Prohibition
to the Ad-
miralty de-
nied, unless
the Defendant
would appear
and give Bail.
1 Vent. 146,
343.
Raym. 3. 3 Mod. 244. Post 553.

A Suit was in the Admiralty against the Master and Ship which lay in the Thames, for heedlessly running over another Ship, and the Defendant there moved for a Prohibition: The Plaintiff informed the Court, that the Defendant would not appear, so that he could have no Remedy at Law; upon which the Court refused a Prohibition, unless the Defendant would appear and give Bail.

Harris *versus* Hicks. Hill. 4 & 5 W. & M. B. R.

(4.)
Prohibition
quoad annul-
ling Mar-
riage and
bastardizing
Issue.
1 Salk. 120.
to 123.
3 Lev. 410.
Lutw. 1059,
1075.
4 Mod. 182.
Carth. 271.
call'd Hinks
vers. Harris.

PROHIBITION was moved for to the Ecclesiastical Court of Coventry, where a Suit was against the Plaintiff for Incest, in marrying his first Wife's Sister, suggesting that the second Wife was dead, and by his said Wife he had a Son, whom an Estate was descended as heir to his Mother, and notwithstanding that he had pleaded this Matter, they went on to annul the Marriage and bastardize the Issue. Et per Cur', A Prohibition shall go as to Annulling the Marriage or Bastardizing the Issue, but they may proceed to punish the Incest.

S. C. 4 Mod. 182. Comb. 200. Cases B. R. 35.

Lutw. 1037,
1043, 1053.

Hawkin's Case. Hill. 8 Will. III. B. R.

(5.)
Prohibition
to a Suit for
calling H.
Knave.
Vide Far. 31.
Post 692,
693.
2 Lev 49, 63,
66.
3 Lev. 17,
119, 137, 350.

H. Libelled in the Spiritual Court for calling him a Knave, a Knave, and a Knave indeed; and a Prohibition granted, because nothing was said that could make him liable to Ecclesiastical Censure. The Statute de circumspecte agatis mentions only such Defamations as are punishable in the Spiritual Court; and for such as the Spiritual Court cannot punish, the Party shall not be liable there: The Reason why the laying of hands upon a Clergyman was there suable, was, because the Clerk having habitum & tonsuram, which made him known, it was an Affront to the whole Order.

(6.)
Prohibition
may be grant-
ed after Sen-
tence where
Cause is not
of spiritual
Conscience;
otherwise for
citing out of
the Diocese.
Vide Faresl.
137, 148.
S. C. Cases
B. R. 196.

Gardner *versus* Booth. Trin. 10 Will. III. B. R.

WHERE it doth appear in the Libel, or by the Proceedings in the Cause, that the Conuzance of the Cause does not belong to the Spiritual Court, a Prohibition may be moved for and granted after Sentence; and this holds in all Cases but where one is sued out of his Diocese; for there, he doth not take Advantage of it before Sentence, he shall not

Prohibition after Sentence; ratio est, because the Cause doth belong to the Spiritual Court; and tho' it doth not belong to that Spiritual Court, it belongs to some other, and not to the King's Temporal Court.

1 Show. 158, 172. 6 Mod. 252. 1 Sid. 65, 632. N. B. 2 Lev. 230.

Bishop of St. David's Case. Pasch. 11 Will. III. B. R. (7.)
Vide this Case, Title Bishops, Archbishops, &c.
Part I. page 134.

Godfrey *versus* Llewelin. Trin. 11 Will. III. B. R.

WHERE the Matter suggested for a Prohibition appears upon the Face of the Libel, we never insist upon an Affidavit; but unless it appear upon the Face of the Libel, or if you move for a Prohibition as to more than appears on the Face of the Libel to be out of their Jurisdiction, you ought to have Affidavit of the Truth of your Suggestion. Per Holt C. J. & postea Trin. 12 W. III. B. R. Vide 2 Co. 45.

(8.)
Where Matter of the Suggestion does not appear on Libel, Affidavit is necessary.
Hob. 79.
Ante 461.
1 Lev. 253.
S.C. Holt 593.

Machin *versus* Maulin. Mich. 11 Will. III. B. R.

IN a Declaration in Attachment for Prohibition, the Case was, That the Plaintiff lived in Nottingham within the Province of York, and there substracted Tithes, and then removed into Lincolnshire within the Province of Canterbury: Afterwards he happened to go to York, and was sued there in the Court of the Archbishop, for the Subtraction aforesaid, and had a Prohibition 32 H. 8. c. 9. for citing him out of his Diocese. But at last, after Debate, a Consultation was awarded; for that the Subtraction of Tithes is local, and must be sued before the Ordinary of that Place where the Wrong was done; otherwise in Cases transitory, ubi forum sequitur reum: And as it was argued by the Counsel, this is not citing out of his Diocese within the Statute, because the Diocese where he lives has not a Jurisdiction; and if he might not be cited in this Case, the Thing would be remediless and dispunishable. Vide Godb. 191. 1 Ro. Rep. 328. Cro. 97. 13 Co. 4. Winch 570. 2 Ro. Rep. 448. 3 Mod. 1. 2 Brown. 12, 28.

(9.)
H. substracts Tithes in one Diocese, and removes into another, Afterwards being found in the first, is there cited and sued, and a Consultation awarded. Subtraction of Tithes local.
Raym. 95.
Lutw. 1043, 1057, 1062, 1071.
S. C. 5 Mod. 450.
N. Lutw. 335.
Carth. 276.
3 Salk. 90.
Cases B. R. 232.

Jones *versus* Stone. Trin. 12 Will. III. B. R.

(10.)
Suit in the
Ecclesiasti-
cal Court a-
gainst the
Vicar of S.
for not per-
forming Di-
vine Service
in the Cha-
pel of C. as
bound by
Custom, Pro-
hibition de-
nied.
S. C. Holt
596.

Farell. 88.
6 Mod. 230.
F.N. B. 51. b.

DAVID JONES, the Vicar of N. was libelled against the Spiritual Court, for that by Custom Time out of Mind the Vicars of S. had by themselves, or others, said and performed Divine Service in the Chapel of Chawbury, for which there was such a Recompence; and that he neglected. The Defendant came for a Prohibition, and without traversing the Custom, suggested that all Customs were triable at Common Law: And Mr. Harcourt urged, That it was enough for a Prohibition, that a Custom appeared to charge the Vicar with Duty for which he was not liable of common Right. Et Holt C. J. A Parson may be bound to an Ecclesiastical Duty by Custom, and when he is bound by Custom, the Spiritual Court may punish him if he neglects that Duty; the Custom might be a reasonable Commencement by Composition in the Spiritual Court, and begin by an Ecclesiastical Act: And a bare Prescription only is not a sufficient Ground for a Prohibition, unless it concerns a Layman; whereas here it is an Ecclesiastical Right of an Ecclesiastical Person and an Ecclesiastical Duty, and the Prescription not denied; notwithstanding 2 Inst. 491. I never can get a Prohibition to stay a Suit in the Spiritual Court against a Parson for a Pension by Prescription. Vide 1 Vent. 3, 120, 2

Sir Basil Firebrass's Case.

(11.)
Prohibition
granted to a
Suit in Equi-
ty for Discov-
ery of Mat-
ters to make
the Defen-
dant forfeit
his Freehold.
4 Leon. Cal.
261.
Vide ante pl. 1. Raym. 88, 221.

HAS chief Ranger of Enfield-Chase, and now a Bill was exhibited against him in the Chancery of the Dutchy for Discovery of what Deer he had killed, and what Timber, Wood &c. he had felled and cut down, and by what Warrant, and shew Cause why his Patent should not be repealed. And to this Suit a Prohibition was granted nisi; for he shall not be obliged to answer upon his Oath, what is to make him forfeit his Place but it ought to be proved against him.

(12.)
Trespas in
B. R. for ta-
king Wines
staid by Or-
der of Ex-
chequer, an
Information
of Seizure
depending
there.

Earle *versus* Paine. Mich. 12 Will. III. B. R.

PAINE, a Custom-house Officer exhibited an Information for Seizure of a Hogshead of Wine belonging to Mr. Earle and seized for not paying Custom. Earle neglected to come and enter his Claim in the Exchequer, but in the mean time brought Trespas in B. R. against Paine. Upon Motion the Court ordered the Proceedings in the King's Bench should be

ed, and the Cause there removed into the Exchequer in the same State and Forwardness: Earle was served with the Order, but notwithstanding gave Rules for pleading; whereupon an Attachment was issued by the Exchequer against him; whereupon he moved here for a Prohibition to the Court of Exchequer. And a Rule was made to hear Counsel; on the Argument several Precedents were cited, one in 19 H. 7. Rot. 16. exactly like this. The Court took Time to consider of the Precedents, and in the mean Time the Matter was compounded. Vide Reg. 187. 2 Inst. 551.

Exchequer
Privilege
Vid. ante 546.

Anonymus. Hill. 12 Will. III. B. R.

IN the Bishop of Winchester's Case, 2 Co. 45. It is held (13.) That in a Suit for Tithes in the Spiritual Court, H. may have a Prohibition, suggesting a Prescription of Modus, before or without pleading. But this seems not to be Law, for 12 W. 3. B. R. a Prohibition was moved for, suggesting a Custom, &c. Prohibition shall not go for a Modus or other foreign Matter, unless it be pleaded below. Et per Holt C. J. and the Court it was denied, unless they pleaded it below, because perhaps they might admit the Plea. Post 656, 657. Also 10 W. 3. B. R. it was said by Holt C. J. That if a Modus be pleaded in the Spiritual Court and admitted, no Prohibition shall go; but if the Question be, whether a Modus or no Modus, Prohibition shall go, and so is the Law, viz. Where-ever the Matter which you suggest for a Prohibition is foreign to the Libel, you must plead it below, before you can have a Prohibition; otherwise where the Cause of Prohibition appears on the Face of the Libel.

Jacob *versus* Dallow. Pasch. 1 Ann. B. R.

S.C. Faresl 8.
6 Mod. 230.
5 Mod. 436.
Cases B. R.
233.

THE Plaintiff declared in a Prohibition, setting forth a prescriptive Right in the Plaintiff and those whose Estate he had, &c. to a Seat in the Church, and that the Defendant permitting a Usage Time out of Mind, had libelled against him in the Spiritual Court, for disturbing him in sitting there; and shews that he had denied the Usage in the Spiritual Court, and the Judge had refused to allow his Plea: The Defendant traversed the Plaintiff's Prescription, and pleaded his own Usage; upon which there was a Demurrer: Mr. Eyre urged, That tho' the Plaintiff had by his Demurrer confessed his Prescription to be true, and by Consequence that he had no Right to the Seat; yet the Defendant grounding his Libel below upon a Custom which is not triable there, he could not have a Consultation. Vide Lutw. 1032. 5 Mod. 69, 70, 71. 1 Keb. 457.

(14.)
H. having a prescriptive Right to a Seat in a Church, and being disturbed, may sue in the Spiritual Court to have his Possession quieted.
Vide Lutw. 1032.
5 Mod. 69,
70, 71.
1 Keb. 457.

sturb

sturb the Possession of the Defendant; and the Ordinary hath Conulance of such Disturbance, and may settle it according to Usage and Possession, unless there be a temporal prescriptive Title hurt by their Sentence; and the Defendant might well sue in the Ecclesiastical Court to have his Possession quieted, and might admit his Prescription to be tried there, as a Defendant does a Modus or a Pension by Prescription.

S. C. Farell.
78, 79, &c.
Holt 597, 50.

Galizard *versus* Rigault. Mich. 1 Ann. B. R.

(15.)
Prohibition
to a Suit a-
gainst H. for
Solicitation
of Chastity;
H. having
been con-
victed on In-
dictment for
Assault with
Intent to ra-
vish.
2 Lev. 63.

Palm. 579.
Post 692, 693.
1 Cro. 256.
1 Mod. 31.
2 Keb. 589.
1 Vent. 53.
Cro. Car. 393.
1 Sid. 438.

INDICTMENT was for assaulting, beating, wounding and endeavouring to ravish the Wife of B. upon which the Party was convicted, and afterwards the Husband brought an Action of Trespas for the same Cause; and now the Party being also libelled against in the Spiritual Court for the same Fact, viz. for soliciting her Chastity, moved for a Prohibition to the Proceedings in the Spiritual Court; and it was urged for the Jurisdiction of the Spiritual Court, That they may punish for the Solicitation and Incontinence, and that this Suit was pro salute animæ, the other for Fine and Damages. Sed per Curiam A Prohibition was granted; for it being an Attempt and Solicitation to Incontinence, coupled with Force and Violence, it does by reason of the Force, which is temporal, become a temporal Crime in toto; as if one say, Thou art a Whore and a Thief or Thou keepest a Bawdy-house, which are temporal Matters, the Party shall not proceed in the Spiritual Court; whereas, if it were only, Thou art a Whore, a Libel lies in the Spiritual Court. So if it be said of a Woman that she is a Bawd only, and not that she keeps a Bawdy-house. But per Holt C. J. If one commit Adultery, and the Husband bring Assault and Battery, the Plaintiff shall not hinder the Spiritual Court, for 'tis a criminal Proceeding there, and no Indictment lies at Common Law for Adultery. 1 Roll. Abr. 295. 2 Inst. 488.

Partridge's Case. Mich. 1 Ann. B. R.

(16.)
Prohibition
to Probate
of Will of
Lands and
Goods, upon
Suggestion
of Non Com-
pos, denied.
Mod. Cases
239.

A Prohibition was pray'd to the Spiritual Court to stay Probate of a Will, which contained a Devise of Lands and several Legacies, suggesting this Matter, and that the Testator was Non Compos; and the Barquees of Winchester's Case 6 Co. 23. was relied upon: But the Court denied that Case and said, That the Stat. of H. 8. never intended to lessen the Jurisdiction of the Ecclesiastical Court as to the Probate of Wills. And to grant a Prohibition might be inconvenient, for without Probate the Executor cannot sue for Debts, which by the

Means may be lost, and the Will unperform'd. As for granting it quoad the Land, it would be vain, (Vide 2 Ro. 315. 1 Sid. 141. this was the Plea herebefore) because it is no Evidence either pro or con in any Court of Law, but a Proceeding coram non iudice; yet it is good as to the Goods.

Matthews versus Burdett. Hill. 1 Ann. B. R. Vide *this Case, Title Universities and Schools.*

(17.)
S.C. ante 412.
Post 672.

Chambers versus Sir John Jennings. Hill. 1 Ann. B. R. S. C. Farell. 125.

A Suit by Libel was in the Court of Honour for these Words, viz. You a Knight? You a pitiful inconsiderable Fellow. And Rule was made to shew Cause why there should not be a Prohibition: Against which it was urged, That there would be no Remedy in this Case, if this was not allowed: Holt C. J. doubted whether there was or could be any such Court; but said a Prohibition would lie to a pretended Court; and after no one Precedent could be found of such a Suit for Words in the Court of Honour, the Prohibition went absolutely.

(18.)
Prohibition to the Court of Honour.
Vide Lutw. 1053, 1054.
Parliament Cases 58, to 67.
1 Show. 353.
1 Lev. 230.
4 Mod. 128.
1 Sid. 353.
Lutw. 1053.

1 Keb. 310, 316, &c. 2 Hawk. 9, 10.

Anonymus. Hill. 2 Ann. B. R.

PROHIBITION lies for denying a Copy of the Libel to any Ecclesiastical Court; Nam jura Ecclesiastica sunt limitata; and the Party ought to know whether the Matter be within their Jurisdiction, and how to answer. 1 Ro. Rep. 337. Digham's Case. Et Mich. 2 Ann. B. R. 'Twas said by Holt C. J. That it was formerly held by all the Judges of England, that when there was a Proceeding ex Officio in the Ecclesiastical Court, they were not bound to give the Party a Copy of the Articles; but the Law is otherwise: For in such Case, if they refuse to give a Copy of the Articles a Prohibition shall go quousque it be given; and accordingly a Prohibition was granted per Cur'. Nota in Pasch. 11 W. 3. B. R. Hall moved for a Prohibition to the Admiralty for refusing a Copy of the Libel; and it was denied per Holt C. J. Quia n'est deins le Stat.

(19.)
Prohibition lies to the Spiritual Court in any Suit for denying a Copy of the Libel, but not to Admiralty.
See 6 Mod. 156, 308.
Hob. 79, 213.
3 Bulst. 51.
Ante 548.
pl. 3.
1 Vent. 252.
1 Rol. Rep. 337.

Vide 6 Mod.
361.

Post 656.

(20.)

Suggestion

in Case of

Tithes must

be prov'd

within six

Kalendar

Months from

Teste of

Prohibition.

Cro. Car. 208.

Stat. 2 E. 6.

c. 13. §. 14.

Carth. 461.

S. C.

Cases B. R.

206.

Holt 672.

Foy *versus* Lister. Trin. 4 Ann. B. R.

ON a Modus suggested to pay every tenth Day's Milk, from April to November, skimmed and then made into Cheese in lieu of all Tithes of Milk, a Prohibition was granted to the Modus, and settle the Matter; and upon speaking to the Goodness of the Modus, these Cases were cited. 3 Cro. 609. Mod. 909. Latch 226. 1 Ro. 649. N. 17. 648, 649. At last Mr. Eyre came and shewed, That the Prohibition was tested the 29th Day of November, and that six Months, i. e. Kalendar Months (as they ought to be, Noy 30. Hob. 179. Litt. Rep. 19) were expired the 25th Day of May last, and therefore he moved for a Consultation, because in all that Time they had not proved their Suggestion; and had it upon the Statute 2 Ed. 6. And the Court agreed, That the Statute extends to Suits for small as well as great Tithes, and that the six Months are to be computed from the Teste of the Writ; and the Case in Moore 57 wherein it is said there must be six Months in Term-time, was denied. For proving Suggestions, Vide Co. Ent. 462, 463, 4. Consultations for not proving them, Vide Asht. 444. Thes. Brev. 8. Note; The Entry in Ashton is ill in the Award of the Costs, there ought to be a Judgment. Yelv. 119. 1 Brownl. 98.

P R O O F.

Vide tit. Evidence and Witnesses.
1 Salk. 278, 281, 286.
Post 691.
Farell. 129.

Bredon *versus* Gill. Mich. 8 Will. III. B. R.

ON an Appeal from the Commissioners of Excise to the Commissioners of Appeals, according to 12 Car. 2. c. 23. the Question was, Whether the Depositions of the Witnesses, and their Examination written down by the Clerk of the Commissioners of Excise, should be allowed to be Evidence on this Appeal? Or whether the Witnesses should not be brought in again personally, and be examined viva voce? The Commissioners of Appeals thought the Depositions sufficient, and proceeded thereupon; and a Prohibition was moved, but denied at first, because this had been the Course ever since the Statute, and it was a summary Proceeding: That it would occasion Trouble and Delay to the Revenue to bring in all the Witnesses again; and it was but proper the Commissioners of Appeals should have just the same Evidence the first Commissioners had: So it is in an Attaint, and the Law does not make viva voce Evidence necessary, unless before a Jury. In other Cases Depositions may be Evidence: If it were not so in this Case, they would be to try the Matter de novo, instead of trying an Appeal. And postea Pasch. 9 W. 3. B. R. mutata opinione, the Court held, that the Commissioners of Appeal ought to examine the Witnesses de novo on the Appeal; that it was the Intent of the Act, that the Commissioners had a Power given for that Purpose, to administer Oaths: That this was just, because the first Sentence might be by Default, or the Depositions might misrepresent, or not represent the whole Case; and that on Appeals upon Orders of the Court, Examination is always de novo. And a Prohibition was granted; but Holt C. J. said, his private Opinion was, That if the Witnesses were dead, they might use their Depositions.

Vide Farell. 129. The Transfer-Books of the East-India Company allow'd as Evidence, &c.

Vide 7 Co.
17. b.
Kelw. 39.
4 Leon. Cal.
261.
2 Leon. 36.
11 Co. 82.

PROPERTY.

Sutton *versus* Moody. Mich. 9 Will. III. B. R.

H. has the
Property of
Things feræ
Naturæ,
kill'd in his
own Ground.
Vide 11 Co.
17. b.
Et post 637,
667.
Cro. Car. 553.
Comb. 458.
S. C.
5 Mod. 375.
S. C.
3 Salk. 298.
Cal. B. R. 144,
145.
Holt 608.

THE Plaintiff brought Trespass for breaking his Close and hunting there, & Centum cuniculos suos adtunc ibidem invent. occidit, cepit & asportavit; Verdict was for the Plaintiff, and intire Damages: And it was ordered in Arrest of Judgment, That H. cannot have a Property in Conies which are feræ naturæ, unless on a special Account as if he has a Warren of them, then he may say Quare Warrenam suam fregit, & cuniculos suos cepit. Vide 1 Cro. 553. F. N. B. 87. Reg. 93. b. 1 Brownl. 167. Curia contra: For a Warren but a Franchise to keep them; and notwithstanding that, the Owner has no more Property in the Conies themselves than a Man that has them in his own Land; if H. starts a Hare my Close, and kills her there, 'tis my Hare; otherwise if he hunts her into the Ground of a third Person, then 'tis the Hunter's Judgment pro Quer.

Qua

Quantum Meruit.

See 1 Salk.
330.
Post 597.

Snow versus Firebrass. Mich. 12 Will. III. B. R.

Ante 439.
Same Name,
but a differ-
ent Case.

THE Plaintiff declared, That the Defendant, in Con-
sideration that the Plaintiff had found him sufficient
Meat, Drink, Washing and Lodging, pro diversis
mensibus ultimo præteritis, promised to pay him as
much as he should deserve, and averred that he deserved so much:
Upon Non Assumpsit pleaded, and Verdict for the Plaintiff, it
was moved in Arrest of Judgment, that the Declaration was
vague and incertain as to the Time or Number of Months: Sed
per Holt C. J. The Incertainty as to the Length of Time, or
Number of Months, can do no more Harm than Incertainty as
to the Things, which has been often adjudged not to vitiate. It
is enough to aver how much he deserved. Judgment pro Quer. (1.)
Quantum
meruit for
Meat, Drink,
&c. uncer-
tain as to
Time, well.
Cases B. R.
434. S. C.
Holt 609.

See 1 Show.
342.

Glover versus Rogers. Pasch. 4 Ann. B. R.

Plaintiff declared that the Defendant, in Consideration that
the Plaintiff's Testator had transported for him such and
such Merchandizes, promised to pay the Plaintiff's Testator
tantas denar. summas pro transportatione Merchandiz. prædict. ra-
tionabiliter habere meruisset, and avers that he deserved so much.
Upon Non Assumpsit, Verdict was for the Plaintiff, and Judg-
ment in C. B. And now a Writ of Error was brought thereupon
in B. R. and objected that the Word Quantum was wanting, and
it is not said who had deserved, and he avers he deserved so much
for Transportation of Merchandizes. But the Court affirmed
the Judgment: Tantum is enough, viz. The Defendant promised
him to pay him so much he deserved, and meruisset signifies as
much as ipse meruisset; and there being but two Persons in the
Record, it could be no Body but the Transporter, and they must
have been the same Merchandize for which the Promise was made,
otherwise the Plaintiff could not have had a Verdict; which
is cured the Want of Prædict. (2.)
Quantum
omitted, but
held well.

Vide Farell.
106.

Moverley *versus* Ley. Hill. 4 Ann. B.R.

(3.)
To be taken
according to
the Intent of
the Parties.

Assumpsit, and declares quod cum the Defendant, in Con-
deration that the Plaintiff would provide him Heat and
Drink, promised to pay him as much as the Plaintiff habere
meruit, and avers that he deserved so much: There were also
other Counts. Non Assumpsit was pleaded, and Verdict for the
Plaintiff, and intire Damages. Upon Motion in Arrest of Judg-
ment it was objected, that meruit should have been meruerit. The
Court held at first, That this was not False Latin, but False
Sense, which is not cured by a Verdict; and tho' a Dash would
help it, yet they could not by Intendment supply a Dash, for
that was to make another Word. This was moved several Times
and having rested two Terms, the Court gave Judgment for
the Plaintiff, saying, they must take the Words of the Decla-
ration to be the very Words of the Promise, as if the Words
of the Promise had been put in Writing thus by the Parties un-
der their Hands; in which Case the Court ought not to pursue
a grammatical Sense or Construction, which makes the Promise
void, but to construe it so as to make the Parties mean some-
what, as it's plain they did, and that was to pay tantum, quan-
tum habere meruerit.

Farell. 106.

Quan

Quare Impedit.

[*Vide Title* Presentation.]

Vide 1 Salk.
43, 44
Lutw. 1084,
to 1130.

Berkeley *versus* Hansard. Mich. 3 W. & M. B. R.
Rot. 569.

IN a Quare Impedit against A. and B. and the Bishop, A. and B. made Title, and the Bishop pleaded that he claimed nothing but as Ordinary. The Bishop died, A. came and furnished this upon the Roll, and prayed the Plaintiff might reply; upon this an Entry was made, Quod prædict. quer. licet solemniter exactus non venit, nec est prosecutus breve suum prædict. deo consideratum est, &c. & breve Episcopo. Upon this a Writ of Error was brought, and the Judgment was affirmed; for it is Non suit after Appearance, which in a Quare Impedit is peremptory. Vide 7 Co. 27. b. 2 H. 4. 1. b. 14 H. 7. 19. b.

(1.)
In Quare Impedit Non-suit after Appearance is peremptory. Co. Lit. 139 a.

Dominus Rex & Domina Regina *versus* The Bishop of London and Dr. Lancaster. Trin. 5 W. & M. B. R.

S. C. 3 Lev.
377, & 382.
4 Mod. 200.
Parliament
Cases 164.

Comb. 205, 300. Carth. 313. 1 Show. 413, 441, 493. Holt 585.

IN the great Case of the Quare Impedit for the Church of St. Martin's in the Fields the Defendant prayed Oyer of the Writ, and pleaded in Abatement Variance between the Writ and the Count; the first being Quæ ad nostram donationem spectat, the latter Quæ ad suam donationem spectat jure Prærogativæ: And Demurrer it was objected, That the Title by the Writ is a Title in Fee, this in the Count is only a Turn pro hac vice; sed non allocatur; for the Precedents are so, and the Writ is always general. Shower pro Def': Suppose then the King should have Judgment by Default, and a Writ to the Bishop, would this be a general Title to the Crown, and become a Usurpation? Holt C. J. No; for where the King hath Judgment by Default in a Quare Impedit, he, as well as a Subject, must by Suggestion on the Roll set forth his special Title. Respondeas ouster awarded.

(2.)
In Case of a Prærogative Turn the Writ is general, quæ ad nostram spectat donationem.

Dominus

Dominus Rex *versus* The Bishop of Chester, Pierce and Cook. Hill. 9 Will. III. B. R.

(3.)
King's Grant
of an Advowson.
Vide Hob.
143.
3 Co. 4, 5.
10 Co. 101.
Owen 43.
1 Leon. 21,
201, 277.
6 Co. Dough-
ty's Case.
5 Mod. 287,
335, 336,
297, S. C.
Carth. 440.
S. C.
Parl. Cases
212.
3 Lev. 377.
4 Mod. 200.
Hob. 224,
230.
Mo. 413.
2 And. 32,
56, 154.
3 Salk. 24,
40.
Cas. B. R. 185.
Show. P. C.
212.
Skin. 651.

IN a Quare Impedit the Plaintiff declared, That *M.* Elizabeth on the 14th Day of February in the 12th Year of her Reign was seised of the Advowson of Bedel, ut de uno grosso, and presented Symms: That the Queen died, and it descended to *R.* James and he was seised ut de grosso: So to *R.* Charles, and that *R.* Charles was seised ut de grosso, and presented Wickham; and that afterwards Wickham died, and one *J.* Peirce, non habens jus, sed usurpando presentavit Metcalfe: That *R.* Charles I. died seised, and it descended to *R.* Charles II. &c.

Defendant pleads that *R.* Charles I. was seised in Gross; but that he after his Presentation of Wickham, by Letters Patent granted the Advowson aforesaid to one Thackston, adtunc Armigero, postea Militi.

Et quod prædicto tempore quo Peirce is supposed to have usurped super Dominum Regem, ipse idem Peirce usurpavit super dict. W. Thackston, and presented Metcalf: Et quod postea the said Thackston released the Advowson, and his Right therein, to him the said *J.* Peirce and his Heirs, and traverses the dying seisin of *R.* Charles I.

The Attorney General prayed Oyer of the Letters Patent which reciting that *M.* Elizabeth, in the 13th Year of her Reign granted the Manor of Bedel, with the Advowson adinde spectantem to the Earl of Warwick, and that the said Manor was come to Sir W. Thackston, Knt. Sciatis igitur Nos dedisse & concessisse præfato Will'o Thackston mil. advocatorem Ecclesiæ prædictæ, and thereupon demurred to the Plea. Judgment was given in Case for the King, and a Writ of Error brought; and thereupon was objected, That the Advowson which the King meant to pass was an Advowson which *M.* Elizabeth granted to the Earl of Warwick, and that the said Grant to the Earl of Warwick was void; for the Queen, Anno 12 Regni sui, being seised of the Advowson ut de grosso, could not Anno 13. grant this as an Advowson appendant, and that this is admitted by the Defendant. And if this was an Advowson in Gross, and so descended to Charles I. his Confirmation or Grant to Thackston upon a Supposal wherein he was deceived, will be void; and that the said W. Thackston in the Letters Patent, and the W. Thackston in the Grant, appear to be different Persons. On the other Side it was urged, That the Queen might be seised of this Advowson as Gross at the Time she presented, and at the Time she died, and yet might be seised of it as appendant when she granted it to the Earl of Warwick, for she might have the Advowson again at

the Grant to the Earl of Warwick, and then present; and that the Court ought to intend every Thing to make the King's Grant good.

To clear this, the Chief Justice, Rokeby and Eyre Justices, held,

1st, That the Time of the Seisin laid in the Count was immaterially alledged; for 'tis sufficient to say, tempore pacis, tempore Domina Regina, and therefore 'tis not traversable: In Trespass Quare, &c. it is necessary to lay a certain Time; yet when there the precise Time is not material nor traversable, but any Time before the suing of the Writ may be given in Evidence; a fortiori here, &c.

2dly, That which is not material nor traversable is not admitted nor confessed when it is alledged, and not traversed: Ergo, as the Plaintiff, upon Non present. modo & forma, might give in Evidence a Presentation any Time, so the Court may intend it. Vide 1 Inst. 352. Hob. 71. 2 Leon. 99.

2 Saund. 295, 180. 1 Lev. 92. 2 Lev. 112. 1 Mod. 72.

3dly, The Grant of the Queen, as recited, is said to be interalia, so there may be other Words which are sufficient to pass an Abbowson in Gross to the Earl; and the Intent of K. Charles I. is plain, and this Consideration might be sufficient, as the Requisition of a Suit against the King, or the Surrender of a void Patent is a good Consideration for a new Grant. And as to the Recitals, which were not all answered, Holt C. J. said, Where appears by the Recitals the King intended not to pass any Thing he had an apparent Right in, but only what was concealed, the Recital will qualify the Grant; which is Legat's Case. 10 Co. 5. But where there are Words in the Grant which shew the King designed to pass the Land, tho' they were not concealed, there the Grant shall be good to pass the Lands. Hard. 231.

4thly, Holt C. J. Turton and Eyre Justices, held, That William Thackston Esq; in the Plea, could not be W. Thackston Knt. mentioned in the Letters Patent, for Esquire is drowned in the Name of Knight, so that a Knight cannot be an Esquire; and a Grant to A. B. Knt. is absolutely void, if A. B. be only an Esquire. Knight is a Name of Dignity, and Parcel of a Man's Name, as such as his Christian Name. It was said that it should have been averred, That W. Thackston was revera an Esq; but cognit. reputat Miles at the Time of the Grant; but that would not be aided it, for a Man cannot be a Knight by Reputation, for there can be no Foundation for such a Reputation; and it is not the Party's saying in his Plea, I am the Man, that will explain the Grant, but the Identity must appear on the Face of the Grant itself. Upon this the Judgment was affirm'd by Holt C. J. Turton and Eyre Justices; but Rokeby J. held that there was a sufficient demonstratio Personæ, and that it ought to have been reversed.

Sufficient to lay Seisin tempore pacis, tempore Domini Regis.

That which is immaterial is not admitted by not being traversed.

1 Vent. 127.

1 Mod. 72.

In Grants where the King's Intent appears to pass the Thing, it shall pass, notwithstanding false Recitals.

Vide Hob. 143, 229, 230. 3 Co. 4, 5. 5 Co. 93. 3 Lev. 49.

Grant to a Knight by the Name of Esquire, is void.

See 2 Inst. 668. 16 H. 6. 28. 18 H. 6. 8. 6 Co. 27. Litt. R. 81. Hard. 198. 1 Sid. 40. Farell. 38. 2 Inst. 583. 594, 666. 2 Cro. 679. Litt. Rep. 121. 1 Bulst. 21.

See Co. Litt.

303.

3 Lev. 19.

1 Lev. 190.

1 Salk. 363.

1 Mod. 231.

QUESTATE.

See 5 Mod.

150.

Post 629.

1 Lev. 190.

1 Sid. 298. 2 Sid. 10. Comb. 476. S. C. Carth. 444. Cases B. R. 190. Holt 610.

Scilly *versus* Dally. Pasch. 10 Will. III. B. R.
Intr. Hill. 9. Will. III. B. R. Rot. 747.

Commence-
ment of par-
ticular Estate
must be
shewn.

1 Mod. 231.

2 Mod. 143.

144.

2 Show. Caf.

426.

Lutw. 80, 81.

5 Mod. 206.

3 Mod. 48.

Cro. Jac. 418.

2 Vent. 184.

3 Lev. 193.

Raym. 389.

2 Keb. 87, 96.

1 Sid. 279.

Show. 64.

3 Lev. 133.

Diversity be-

tween Counts

and Avow-

ries.

IN Replevin the Defendant avowed and set forth, that J. S. was possessed of a Messuage and 40 Acres of Land, letting out the Time of the Commencement of the Lease, and demised, rendring Rent, &c. And that he being possessed of the Reversion died, and it came to his Executor, and for Rent arrear he avow'd. The Plaintiff demurr'd, and shew'd for Cause that the Avowant had not shewn who was Lessor of J. S. And for this it was held naught. Per Holt C. J. In Debt for Rent it is enough to say dimisit: And if it be brought against an Assignee that he demised to such a one, whose Estate the Defendant hath is enough for the Lessor or his Executor, (Quære tamen of the Heir) without making a good Title to himself; yet an Avowry differs from a Declaration in many Respects. In a Declaration in Debt for Rent, Nil debet is a good Plea, and traverses the whole Declaration; but there can be no general Issue to an Avowry, but some special Point must be traversed; and therefore because it does not appear out of what Estate, or in what Name this Term was derived, Judgment must be for the Plaintiff. Vide Cro. Car. 571. The Reason why the Commencement of particular Estates must be shewed in Pleading, is, because they are created by Agreement out of the primitive Estate; and the Court must judge whether the primitive Estate and Agreement be sufficient to produce the particular Estate claimed: And this is a fundamental Rule, which ought not to be broken upon fancied Conveniencies.

Recognizance, Statutes, Elegit, Extent, &c.

Vide Farell.
38, 97.
Hob. 196.
Cro. Car. 148.
Cro. Jac. 2,
12, 449, &c.

Hammond *versus* Wood. Trin. 3 W. & M. B. R.

Vide Cro.
Car. 141,
149.

THE Conusee of a Statute had Lands extended and delivered to him upon a Liberate: The Conusor being in Possession, continued his Possession; afterwards the extended Interest was assigned; and the Question was, whether it was assignable? The Court held not: It was objected, That before Entry by the Conusee, this was like an Interest in *termini*, or the Interest of one that has a Lease to commence at a future Day, which is assignable; so here the Conusee hath an Estate before Entry: Sed per Holt C. J. By Return of the Ex. an Interest vested in the Conusee: The End of the Liberate is to have an actual Possession of the Interest; and it must be taken that he has by the Return of the Liberate; the Sheriff returning thereupon *liberari feci*, the Conusee is estopped to say otherwise: If then the Conusor continues to keep Possession after his Return, the Conusee's Estate is turned to a Right, like the Case of Disseisee making continual Claim, as soon as ever the Disseisee leaves the Premises, the Continuance of Possession by the Disseisor, makes a fresh Disseisin. Vide 1 Inst. 156. Lit. 129. and this is not like the Case of Mortgagor, who continues in by consent, and not in Opposition to the Mortgagee.

(1.)
Conusee cannot assign his Interest after Extent and Liberate, if Conusor continues in Possession.
Vide Farell.
38, 97.
Cro. Jac. 3,
12, 449.
1 Show. 281.
3 Lev. 312.
1 Vent. 42.
4 Mod. 48.
S. C. 3 D. 166.
p. 16.
Skin. 300.
Holt 611,
263.

Purten *versus* Purbeck. Trin. 12 Will. III. B. R.

Vide Cro.
Jac. 12.

TO a Scire facias upon a Judgment, the Defendant pleaded in Bar, that the Plaintiff had before sued an Elegit on the same Judgment directed to the Sheriff, who thereupon returned an Indiction taken, and a Delivery of such certain Parcels thereof. Et nota, the Parcels amounted to more than a Moiety] and upon Judgment, if the Plaintiff should have any other Execution, to which it was demurred; and the Court held that the Execution was meerly void; for the Sheriff had only a circumscribed Authority, and had exceeded it; and if the Plaintiff had brought

(2.)
On Elegit, if the Sheriff deliver more than a Moiety, the Execution is void.
1 Vent. 259.
S. C. Cases
B. R. 355.

an Ejectment, he could not have recovered the Possession on the Title, and therefore should be at Liberty to pursue a more effectual Execution.

Domina Regina *versus* Ewer. Pasch. 1 Ann. B. R.

(3.)

Certiorari to remove an Indictment not a Superfedeas, unless Recognizance entered into in 20 l.

Vide 1 Salk.

147, 148,

149.

Farell. 9,

120, 121.

S. C. 3 Salk.

369.

Holt 612.

Vide post

600, 619.

6 Mod. 42.

2 Leon. 24.

(4.)

In C. B. if Recognizance be taken at a Judge's Chamber, it must be so declar'd on; but in B. R. as if taken in Court.

Vide Hob.

196.

March 159.

6 Mod. 42,

132. S. C.

Aleyn 12.

1 Cro. 312.

S. C. 3 D.

314. p. 6.

Holt 612.

A Scire facias was brought on a Recognizance taken before a Judge upon granting a Certiorari to remove an Indictment from the Sessions of the Peace, which upon Oyer was entered *hæc verba*; and was for 40 l. whereas the Sum prescribed by the Statute is 20 l. Et per Holt C. J. Before 5 & 6 W. & M. c. 1. any Judge might take a Recognizance, which is not taken abroad but if it be not according to the Statute, which is in 20 l. t. Certiorari will be no Superfedeas; yet, whether it be or no, it is still good as a Recognizance at Common Law.

Shuttle *versus* Wood. Mich. 2 Ann. B. R.

IN Debt on a Recognizance of Bail in C. B. the Plaintiff declared that the Defendant per scriptum suum obligatorium cognit. in curia dictæ Domine Regine de Banco coram Thos Trevor Mil. & Sociis suis, &c. Defendant pleaded Nul tiel Record; the Recognizance certified, appeared to be taken before Mr. Justice Nevel, at his Chambers. Et per tot. Cur', the Plaintiff hath failed of his Record, and hath varied in his description from the Recognizance. Et per Holt C. J. If it had been entered as taken in Court, then it had been well enough. In this Court the Course is always to enter them as taken in Court, tho' taken actually by a Judge in his Chamber, and in this Court they are not taken in a Sum certain, as in C. B. neither are they a Record till entered; but in C. B. 'tis a Record immediately upon the first Caption, and binds the Lands before it be filed at Westminster, and when it is filed, then it is a Record in Court, and a Scire facias or Debt lies upon it, either in Middlesex where filed, or in London where taken; whereas a Recognizance in this Court of B. R. the Action or Scire facias must always be brought in Middlesex.

R E C O R D S.

See 2 Saund.
294, 393.
6 Mod. 18,
243, 257.

Waites *versus* Briggs. Mich. 6 W. & M. B. R.

S. C. 5 Mod.
8, 9.
Holt 613.

Vide 1 Sid. 429. 6 Mod. 103. Lutw. 332. 2 Salk. 298.

IN Debt for an Escape the Plaintiff declared the Prisoner was committed and escaped, and because he did not say prout patet per Recordum, the Defendant demurred generally; but the Plaintiff had Judgment; for the Gist of the Case was the Escape, and the Commitment only Inducement. Et per Holt C. J. In Debt on a Judgment quod cum recuperas, is good without a Prout patet per Recordum; and the Defendant may plead Nul tiel Record. Et per G. Eyre J. The Matter here is grounded on the Fact, for Nil debet is a good Plea, and not on the Matter of Record. And the Rule in Co. Lit. 303. where the Difference is taken between Cases, where the Record is the very Foundation, and where Inducement, is a good Distinction. Vide 1 Sid. 16. Judgment for the Plaintiff.

(1.)
In Escape the Plaintiff did not alledge the Commitment prout patet per Recordum, but well on general Demurrer.

Vide 3 Lev. 311.
1 Lutw. 111.
See now the Stat. 4, 5
Ann. c. 16.
1 Keb. 761.
1 Lev. 137.
1 Faresl. 53.

1 Sid. 216. Hob. 210. 1 Saund. 336. 1 Salk. 238. Hob. 233. Show. 4.

Cominus Rex *versus* North. Hill. 8 Will. III. B. R.

PER Holt C. J. It is an Error in the Clerks in London, that upon a Certiorari they return only a Transcript, as if the Record remained below; for in C. B. tho' they do not return the very individual Record, yet the Transcript is returned as if it were the Record, and so it is in Judgment of Law.

(2.)
Upon a Certiorari the very Record is returned, 6 Mod. 188.

Thompson *versus* Leach. Pasch. 9 Will. III. B. R.

S. C. ante
427.
Post 576, 618,
675.

PER Holt C. J. You ought not to move to read a Word of a Record, in order to make a Consilium, where the Roll is a precedent Term, unless it be filed; for you ought not to move for a loose Roll, unless it be a Roll of that Term of which it ought to be a Record.

(3.)
Roll of precedent Term ought to be filed.

Vide 3 Lev.

S. C. Eq. Ab. 178. p. 3. 3 D. 164. p. 13. 3 Salk. 300. 1 Show. 296. 3 Mod. 296, 301, 384. Show. P. C. 150. 2 Vent. 198. Comb. 488, 468. Carth. 211, 250, 435. Holt 357, 465. Cases B. R. 475.

Vol. II.

X 2

Moor

Moor *versus* Manuapt. Garret. Mich. 10 Will. III. B. R.

(4.)
Upon Nul
tiel Record
pleaded of a
Record of the
same Court,
Day may be
given to the
Party to
bring it in, or
for the Justi-
ces to inspect
the Record;
but Defen-
dant cannot
demur.
Vide 3 Lev.
243.
S. C. Cases
B. R. 214.
Holt 558.

A Scire Facias against Bail; the Defendant pleaded, That *capias* issued forth against the Principal; the Plaintiff replied and set out the *capias*, prout patet per Recordum, &c. Defendant rejoins Nul tiel Record. Plaintiff surrejoins, habetur tale Recordum, and prayed that the Court will inspect the Rolls &c. The Defendant demurs, and the Court held this Demurrer was ill: Upon Nul tiel Record pleaded, where it is a Record of another Court, the other Party replies, quod habetur tale Recordum, and the Court gives him a Day to bring it in: But H. pleads a Record of the same Court, the other Side may crave Oyer, &c. or may plead Nul tiel Record, and then there are two Ways of Proceeding in such Case; for either the Court may give the Party a Day to produce the Record; which Entry is Et dictum est præfato defendenti, quod habeat Recordum hic tunc die sub suo periculo, &c. or the Court may give Day to inspect the Record themselves. Et quia Justiciarii hic se advisare voluerunt super inspectione & examinatione Recordi per prædict. Defendentem superius allegati dies datus est partibus prædict. hic usque; &c. Vide Dy. 228.

But in the principal Case, what does the Defendant do by his Demurrer, but deny that the Court can inspect the Records of the Court before them? Which they may most undoubtedly; therefore Judgment must be given against him.

Anonymus. Trin. 11 Will. III. B. R.

(5.)
Printed Sta-
tute not Evi-
dence upon
Nul tiel Re-
cord.
3 Lev. 243.

IN an Action against H. Defendant pleaded the Composition of the Assize; the Plaintiff replied Nul tiel Record; upon the Day given to bring in the Record, the Defendant brought in the printed Assize. Et per Holt C. J. An Assize printed by the King's Printers is allowed good Evidence of the Assize to a Jury; but was never allowed to be a Record yet: You must get an Exemplification under the Great Seal, and then plead it exemplified, and then you can deny it.

(6.)
Assize of the
Court upon
Record may
be altered the
same Term,
of the Party,
nor.
S. C. Antie
259.
Post 649.

Turner *versus* Barnaby. Trin. 2 Ann. B. R.

IN Ejectment, the Defendant being called to confess Lease, Entry and Duffer, made Default, and that Default was recorded. Afterwards the Plaintiff would have waived it, supplying the Record of it to be in the Breast of the Court during the Term.

Term. Et per Holt C. J. There is a Diversity between an *Assize* of the Court done upon Record, for that is in the Breast of the Court; and may be altered by them during the Term, and an *Assize* of the Party recorded by the Court, as a *Non-suit* or *Default*; for that once recorded, cannot be altered by the Court; for that would be a Means of introducing Falsity in Matter of Fact into Records.

See Ray. 69.
3 Lev. 219.

Common Recoveries.

Vide 1 Co.
14, 61.
2 Co. 74.
5 Co. 40.

Lit. R. 234. 2 Lev. 31. 2 Mod. 70. Lutw. 1549. Post 591.

Sir John St. Albans's Case. Trin. 1 W. & M. C. B.

SIR John St. Albans being of the Age of nineteen Years, his Sister who was the next in Remainder, and also his Heir, married one of his Footmen: He petitioned the King for Leave to suffer a Common Recovery, who referred it to the Judges of the Common Pleas, before whom several Precedents of Recoveries, suffered by Infants upon Privy Seals, were cited, viz. One Bivarny, the 1st Day of June, 10 Car. 1. One Young the 23d Day of November, 11 Car. 1. another 13 Car. 1. another 14 Car. 1. another 1 Jac. 2. another Jac. 2. by Toby; another 4 Jac. 2. another by John Croke, son of Sir John Croke, 10 Car. 2. The Judges observed that seven of the Petitions were by Fathers upon the Marriage of their Sons, and an equal Recompence given; whereas here was neither Father nor Marriage in the Case; and they said this Case had been carried too far already, therefore disallowed it. Vide Hob. 196. 1 Ro. 731. 1 Cro. 307.

(1.)
Recovery
suffer'd by an
Infant.
1 Sid. 321.
2 Keb. 141.
Styl. 246.
Cro. El. 321.
1 Mod. 48,
246, 247.
3 Lev. 36.
1 Vent. 69.
2 Vent. 30,
90.

Clithero

Clithero versus Franklin & Ux'. Pasch. 2 W. & M. C. R.
 Rot. 207.

(2.)
 To A. and
 his Wife for
 Life, Re-
 mainder to
 the Heirs
 Male of A.
 on the Wife
 begotten; A.
 cannot dock
 this during
 the Wife's
 Life.
 S. C. Lilly
 Ent. 92, 523.

IN a Writ of Ayel the Issue was, Whether the Grandfather died seised in Fee? The Jury found that the Grandfather bequeathed to stand seised to the Use of himself and Mary his Wife for their Lives, Remainder to the Heirs Male of the Grandfather on the Body of the said Mary begotten, with Remainders over: The Grandfather suffered a Common Recovery and died: Mary survived. To prove the Recovery void, it was insisted, that Owen and Morgan's Case was not Law; for if Baron and Feme had an Intirety, then each had the Whole, and the Baron might make a Tenant to the Precipe for the Whole. Pemberton contra, That Case was never yet questioned; the Wife's Estate hinders the Intail from executing in the Baron so that 'tis only a kind of contingent Estate after the Death of the Wife, and the Intail cannot be tacked to the Estate for Life of the Husband, during the Life of the Wife; because during her Life there is an intervening Estate; and accordingly adjudged 3 Co. 6. Flo, Manly's Case, 8, 9. 1 Cro. 380. 1 Sid. 82.

S. C. 1 Show.
 347.

Lloyd versus Evelin. Pasch. 5 W. & M. B. R.

(3.)
 Tenant by
 Fine, &c.
 Vid. Noy 126.
 1 Mod. 107,
 262.

IN a Writ of Error of a Common Recovery, the Tenant in the Precipe in the Common Recovery was made by a Fine the Recovery was suffered, and the Fine was reversed, yet was held a good Recovery; for there was a Tenant to the Precipe at the Time.

S. P. 1 Show.
 347.
 1 Mod. 218.

Lacy versus Williams. Trin. 11 Will. III. B. R.

(4.)
 If Tenant
 gains the
 Freehold at
 any Time be-
 fore Judg-
 ment, good.
 Vide Cro.
 Jac. 455.
 Lutw. 1549.
 Carth. 472.
 S. C. Comb.
 425.
 Cases B. R.
 261.
 Holt 614.

ERROR of a Judgment in C. B. In Ejectment, wherein a Special Verdict was found, viz. That a Writ of Entry was brought against Miles Corbet, Ret. Quindena Martini. That upon the Return Miles Corbet appeared, and the Demandant counted against him, That he vouched Lacy the Tenant in Tail, and Summons ad Warrantizandum issued, returnable octabis purificationis. After the Teste and before the Return of the Writ Summons, viz. the 1st Day of January, Lacy the Tenant in Tail, conveyed to Miles Corbet by Lease and Release for Life. At the Return of the Summons, Lacy the Tenant in Tail appeared and entered into the Warranty, and vouch'd over the Common Vouchee, and so a Common Recovery was had. The

Recovery being held good in C. B. Serjeant Pratt, for the Plaintiff in Error, insisted, That Miles Corbet was not Tenant to the Præcipe at the Return of the Writ of Entry. He agreed that if he had purchased before the Return of the Writ of Entry, the Recovery had been good, (otherwise if after, as in this Case,) to bind Strangers or the Issue in Tail, tho' it might be good between the Parties by Way of Estoppel. Vide 1 Ro. 868. 21 E. 5. 5 H. 6. 1. 18 E. 4. 26. 9 E. 4. 12. 3 H. 6. 34. Ratio est, because the Tenant could not render the Lands at the Return of the Writ of Entry, and a Voucher supposes a Seisin; for 'tis a good Counterplea that the Voucher had nothing in the Lands at the Time of the Voucher, and the Nec unquam postea is not material; and if the Tenant pleads not Non-tenure as he ought and might, that only binds himself and those that are Parties and claim under him by Estoppel.

Kene contra argued, That the Issue shall be bound where he may have Execution for the Value. 3 Co. 5. 6. 12 E. 5. 19. And 'tis not a sufficient Counterplea of a Voucher to say, the Voucher had nothing tempore, &c. without adding nec unquam postea. East. 367, 126. So it is of Non-tenure, Rast. 273. Where the Tenant appears on the Return of the Writ of Entry, and a Recovery is then had, in such Case the Tenant must have the Freehold at the Return of the Writ, because 'tis a Recovery then suffered; but otherwise where there is a Voucher over, or Counterpleader, as in this Case; for 'tis sufficient if he become Tenant before Judgment. 41 E. 3. 5. 8 E. 3. 32. 10 E. 3. 21. Holt C. J. It is not enough in a Counterplea of a Voucher to say, the Voucher had nothing in the Lands at the Time of the Voucher, without nec unquam postea; so it is of Non-tenure: If the Tenant to the Præcipe gains a Freehold before Judgment, 'tis sufficient, for it cannot be said to be a Recovery against him that had nothing; therefore a Writ may be made good by a subsequent Purchase, and so may a Voucher; and 'tis the more reasonable, because the Demandant may have a good Cause of Action, tho' the Tenant have not the Land; for 'tis not being Tenant to the Præcipe, but the Demandant's having a right to the Land, that is the Foundation and Cause of Action; and therefore 'tis in Law sufficient, if the Tenant have the Land and render at any Time before Judgment. And the Judgment was affirmed Nisi causa. Afterwards Mr. Squib came to shew Cause why the Judgment should not be affirmed, and cited 18 E. 3. 13. E. 4. 26. 2 Ro. 746. Sed non allocatur: And Holt C. J. said the Recompence in the Case of Common Recoveries was rationa, but non unica; for a Reversion expectant is barred by a Common Recovery, and yet the Recompence cannot extend to it; which he said was a bold Advance in Favour of Common Recoveries. This Rule was made absolute.

Clithero versus Franklin & Ux'. Pasch. 2 W. & M. C. R.
Rot. 207.

(2.)
To A. and
his Wife for
Life, Re-
mainder to
the Heirs
Male of A.
on the Wife
begotten; A.
cannot dock
this during
the Wife's
Life.
S. C. Lilly
Ent. 92, 523.

IN a Writ of Ayel the Issue was, Whether the Grandfather died seised in Fee? The Jury found that the Grandfather bequeathed to stand seised to the Use of himself and Mary his Wife for their Lives, Remainder to the Heirs Male of the Grandfather on the Body of the said Mary begotten, with Remainders over: The Grandfather suffered a Common Recovery and died: Mary survived. To prove the Recovery void, it was insisted, that Owen and Morgan's Case was not Law; for if Baron and Feme had an Intirety, then each had the Whole, and the Baron might make a Tenant to the Præcipe for the Whole. Pemberton contra, That Case was never yet questioned; the Wife's Estate hinders the Intail from executing in the Baron so that 'tis only a kind of contingent Estate after the Death of the Wife, and the Intail cannot be tacked to the Estate for Life of the Husband, during the Life of the Wife; because during her Life there is an intervening Estate; and accordingly adjudged 3 Co. 6. Flo, Manxlo's Case, 8, 9. 1 Cro. 380. 1 Sid. 83.

S. C. 1 Show.
347.

Lloyd versus Evelin. Pasch. 5 W. & M. B. R.

(3.)
Tenant by
Fine, &c.
Vid. Noy 126.
1 Mod. 107,
262.

IN a Writ of Error of a Common Recovery, the Tenant in the Præcipe in the Common Recovery was made by a Fine the Recovery was suffered, and the Fine was reversed, yet was held a good Recovery; for there was a Tenant to the Præcipe at the Time.

S. P. 1 Show.
347.
1 Mod. 218.

Lacy versus Williams. Trin. 11 Will. III. B. R.

(4.)
If Tenant
gains the
Freehold at
any Time be-
fore Judg-
ment, good.
Vide Cro.
Jac. 455.
Lutw. 1549.
Carth. 472.
S. C. Comb.
425.
Cases B. R.
261.
Holt 614.

ERROR of a Judgment in C. B. in Ejectment, wherein a Special Verdict was found, viz. That a Writ of Entry was brought against Miles Corbet, Ret. Quindena Martini. That upon the Return Miles Corbet appeared, and the Demandant counted against him, That he vouched Lacy the Tenant in Tail, and Summons ad Warrantizandum issued, returnable octabis purificationis. After the Teste and before the Return of the Writ of Summons, viz. the 1st Day of January, Lacy the Tenant in Tail, conveyed to Miles Corbet by Lease and Release for Life. At the Return of the Summons, Lacy the Tenant in Tail appeared and entered into the Warrant, and vouch'd over the Common Vouchee, and so a Common Recovery was had. The

Recovery being held good in C. B. Serjeant Pratt, for the Plaintiff in Error, insisted, That Miles Corbet was not Tenant to the Præcipe at the Return of the Writ of Entry. He agreed that if he had purchased before the Return of the Writ of Entry, the Recovery had been good, (otherwise if after, as in this Case,) to bind Strangers or the Issue in Tail, tho' it might be good between the Parties by Way of Estoppel. Vide 1 Ro. 868. 21 E. 5. 5 H. 6. 1. 18 E. 4. 26. 9 E. 4. 12. 3 H. 6. 34. Ratio est, because the Tenant could not render the Lands at the Return of the Writ of Entry, and a Voucher supposes a Seisin; for 'tis a good Counterplea that the Voucher had nothing in the Lands at the Time of the Voucher, and the Nec unquam postea is not material; and if the Tenant pleads not Non-tenure as he ought and might, that only binds himself and those that are Parties and claim under him by Estoppel.

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1 Roll. Abr.

865.

Brook, Brief,

Pl. 75, 77.

1 Inst. 102,

365.

Hob. 21.

Non-tenure

cur'd by sub-

sequent Pur-

chase.

Q. 1 Mod.

218.

1 Show. 347.

Lutw. 1549.

Post. 601.

2 Lev. 29, 55.

2 Lutw. 1548.

Page *versus* Hayward. Trin. 3 Ann. B. R.

(6)
S. C. 3 Salk.
96, 135.
Rep. A. Q.
61.
Holt 618.

1 Saund. 180.
2 Lev. 21, 22.
1 Lev. 212.
1 Leon. 283.
1 Vent. 199,
to 305.
10 Co. 41.
1 Mod. 86.
3 Mod. 20.

To A. and
the Heirs of
her Body by
one of the
Name of
Searle, is
Tail.
Vide post.
619, &c.

Words
sounding
conditional
taken as Li-
mitation in
a Will.
Vid. 2 Co. 72,
73, 74, &c.

Condition
that runs
with the
Land cannot
be barr'd by
Recovery, o-
therwise of
Condition
collateral.

NICHOLAS SEARLE by his Will devised to his Niece Mary Bryant and the Heirs Male of her Body, upon Condition and provided that she intermarry with and have Issue Male by one surnamed Searle; and in Default of both Conditions he devised to Eliz. Bryant [in the same Manner] and in Default thereof he devised to George Searle for sixty Years, if he so long live; the Remainder to the Heirs Male of the Body of the said George Searle and their Issue Male for ever. Mary, and Elizabeth with her Husband, (for she had then married one Cliff,) joined in a Fine to make a Tenant to the Præcipe, who was one Isaac Savery. Isaac Savery vouched Mary Bryant, Eliz. Cliff and her Husband, and the Wife of the Devisor with her Husband, she being again married, and vouched them all jointly, and they vouched over the common Vouchers. Et per Holt C. J. & tot. Cur', it was adjudged.

1st, That the Estate devised to Mary was a good Estate-Tail and so was the Estate to Elizabeth; but it is a special Intail 'tis an Estate to her and the Heirs Male of her Body begotten by a Searle, which is a middle Intail; not the highest nor the least; for it might have been to her and the Heirs of her Body begotten by J. Searle, which had been more particular; yet this is a good Estate-Tail within the Statute de donis, for it is within the Reason of the Statute.

2dly, The Words, upon Condition, &c. tho' they are expressed in Words of Condition, shall be taken to be a Limitation; so it is held in 1 Vent. 199, 202. And Holt C. J. said, he saw no Reason why they might not be so construed in a Deed, tho' the Law has not been carried so far; and so the Sense is, if she has no Issue Male by a Searle, upon her Death, the Estate shall remain over.

3dly, That the Estate-Tail of Mary and Elizabeth, or either of them, does not cease by marrying one that is not a Searle; for the Remainder over is in Default of both Conditions, and in the mean Time it is limited to her and the Heirs Male of her Body and she may survive the first Husband and marry a Searle, and there is a Possibility as long as she lives.

4thly, If the Estate had been to Mary and the Heirs Male of her Body by a Searle to be begotten, provided and upon Condition that if she do marry any but a Searle, that then it shall remain to J. S. and his Heirs; a Common Recovery suffered before Marriage will bar the Estate-Tail and Remainders; and tho' she after marry with another, it shall not avoid the Recovery. And the Court took a Difference between a collateral Condition and a Condition that runs with the Land: If the Donor refers to a Recovery

a Rent with a Condition to re-enter, a Recovery will not bar it; otherwise if it be to re-enter for Non-payment of a Sum in Gross.

Vide 1 Mod. 108, 111. 2 Lev. 28.

And as to Common Recoveries (being of great Use) the Chief Justice desired to speak largely.

1st, If Tenant to the Præcipe vouches Tenant in Tail in Possession, and him in Remainder jointly, and they jointly vouch over the common Vouchée, this is good; not but that it may be more regular, that the Tenant vouch Mary Bryant, and she Elizabeth, and she over the common Vouchée, that the Recovery in Value may not be joint, but enure severally: Yet the other Way is sufficient; for where in an Adversary Action a Præcipe is brought against several, 'tis enough that one hath the Tenancy of the Land; and if he would plead that he is sole Tenant, and traverse that the others have any Thing, the Demandant may admit that, and proceed as to him, and the Writ shall only abate as to the rest; also the others may disclaim; and as a Joining a Stranger with a Tenant does not hurt, so a Joining a Stranger with a Vouchée does not; for he is but in loco tenentis, a Tenant by the Warranty. 20 E. 3. 10. 2 E. 3. 8. Br. Several Tenancy 3, 4. 10 H. 6. 14. Rast. 276.

Tenant in Tail, and he in Remainder may be vouch'd jointly. Noy 81, 82. 3 Co. Cuple-dike's Case. 1 And. 275.

2dly, If Tenant in Tail makes a Tenant to the Præcipe, and he vouches a Stranger, and the Stranger vouches Tenant in Tail, and he the common Vouchée, that is good; for his being a Stranger is not material, because in Judgment of Law he is become Tenant by the Voucher to the Præcipe, and a Release to him is good, and the Voucher is good whether there be a real Warranty or not: At Common Law, if a Stranger was vouch'd, the Demandant could not counterplead it; but by West. 1. 40. he may, if he be absent, counterplead the Voucher, viz. that the Voucher and his Ancestors never had any Thing in the Land; not if he be present: It is enough that Tenant in Tail comes in and owns a Warranty, for there may be a Warranty. Suppose an Adversary Action against Tenant in Tail who has a Warranty, and he makes a Feoffment in Fee with Warranty, he has levied a Fine with Warranty, and the Feoffee or Conusee vouch the Tenant in Tail, he may make Use of his Warranty, and yet he was not seised of the Estate-Tail; but in that Case he may dereign the Warranty, and then he recovers in Recompence of his Estate-Tail; for whenever Tenant in Tail comes in as Voucher, he comes in in Privy of all Estates he ever had, and consequently may dereign the Warranty. Vide 1 Inst. 385. a.

If Tenant vouches a Stranger, who vouches Tenant in Tail, and he enters into Warranty, it is good. 1 Vent. 358. 2 Co. 60, 61. Cro. El. 562.

And the Chief Justice said, The Vouchée's being a Stranger is not material; because, tho' there be no real Warranty, the Recovery in Value is the same, and the Admittance of Tenant in Tail has made it real.

Tenant in Tail coming in as Vouchée comes in in Privy of all Estates he ever had. 3 Co. 60, 61.

Vide 1 Lutw.
201, 208.

RECUSANTS.

[Vide Title Church of England.]

Domina Regina *versus* Peach. Mich. 3 Ann. B. R.

Licence to
Dissenting
Minister in-
roll'd in one
County,
don't extend
to another.
6 Mod. 228,
310: S. C.
Post 673.

Noy 117.
Lane 60.
1 Lutw. 208.
4 Leon. 54.
2 Cro. 142.
3 Lev. 61.

A Dissenting Minister having qualified himself according to the Toleration-Act in one County, kept a Conventicle in that County; and afterwards removed into another, and kept a new Conventicle without a new Qualification. The Justices considered him, notwithstanding the Toleration-Act. The Attorney General moved for an Attachment against the Justices, but it was denied; then he moved for a Mandamus to permit him to preach, and that was denied also. The Court held, 1st, That a Mandamus is always to do some Act in Execution of Law, whereas this would be in Nature of a Writ de non molestando. 2dly, That a Dissenting Minister is still liable to the old penal Laws for Preaching in Conventicles unless he qualify himself according to the Act of Toleration. 3dly, That a Licence inrolled at the Sessions in one County, will not extend to another County; but he must have a Licence inrolled in the County where he preaches. But Note; The Law is since alter'd in this Particular, by the Act for preserving the Protestant Religion, by better securing the Church of England. 10 Ann.

Release and Defeazance.

Vide Farell.
74, 75.
2 Saund. 48,
96.

Aloff *versus* Scrimshaw. Trin. I W. & M. B. R. S. P. post
575.

IN Debt on a Bond for 1000 l. the Defendant pleaded a (1.)
Covenant since made by the Plaintiff, whereby he covenant-
ed not to sue for the said Debt upon the said Bond, for and
during the Term of 99 Years: This was held naught upon
Demurrer, for it is but a mere Covenant, and doth not enure
as a Release or Defeazance, and so cannot be pleaded in Bar. Raym. 187,
393, 413.
S. C. 1 Show.
Wide 1 Cro. 352, 623. 1 Ro. 939. 21 H. 7. 24.
46, 47. Comb. 123. Carth. 63. Holt 619.

Clayton *versus* Kynaston. Hill. 10 Will. III. B. R. Intr.
Trin. 10 Will. III. B. R. Rot. 246.

CLAYTON, the Executor of Clayton, the Executor of (2.)
Wintershall, brought Covenant against Kynaston upon Ar-
ticles, and declared as on Articles made between Killigrew and
the said Kynaston, and others ex una parte, and Wintershall ex
altera parte; wherein it was covenanted, that if Wintershall
should be minded to give over acting Plays, and should give No-
tice in Writing three Months before he left off, that then three
Months after such Notice in Writing, Wintershall should be
allowed for every acting Day 5 s. per Day, and that after the
Death of Wintershall, 100 l. should be paid to his Executors
within three Months: Provided such Notice should not be given
but in an acting Week; and for Breach assigns that the 100 l.
was not paid within three Months after Wintershall's Death.
The Defendant pleaded that at the same Time another Deed was
made between the said Wintershall of the one Part, and the said
Kynaston of the other Part, wherein was contained the same
agreement; and then it was farther covenanted by Wintershall in
the same Deed, that in Case he gave Notice as aforesaid, then
the said Kynaston should be discharged of all Debts, and be in-
compensated and saved harmless from all Agreements or Securi-
ties at any Time before made, or hereafter to be entered into;
when he gives Notice was given, and that three Months elapsed,
and so relies upon this as a Defeazance. To this there was
Demurrer.

1st, It was urged for the Defendant, that this was a Defeazance; for whatever the Defendant lost in this Action would be recovered against him on his Covenant, which was but Circuity of Action. Vide 1 And. 307. Mo. pl. 80. 2 Saund. 47, 48. One Deed a Defeazance to another made at the same Time with it. Vide 1 Inst. 265. Rebutter founded on the same Reason.

The Court agreed, That if A. be bound to B. and then B. reciting this Bond, covenants to save him harmless, this is an absolute Defeazance; and if it be to save him harmless on a Contingency, 'tis a conditional Defeazance, because it hath an express Relation to the Deed; but in the principal Case there is not a Relation between the Deeds; but on the contrary, the Plaintiff's Deed is only to indemnify against all Covenants heretofore made, or hereafter to be made. There is therefore no Necessity to construe the Defendant's Deed to be void and useless as soon as made, or that one Deed has destroyed the other which was made at the same Time with it, or that Kynaston may play fast and loose at his Pleasure. Also the Court agreed, That where two are jointly and severally bound in a Bond, a Release to one discharges the other; and in such Case if the joint Remedy is gone, the Several is gone too; and that in the Case at Bar, the joint Remedy was lost: But the Chief Justice, who delivered the Opinion of the rest, said, they did not determine, That on Covenant, where the joint Remedy failed there could not be a several Remedy.

2^{dly}, It was objected to the Declaration, That he declared of a Deed made between Kynaston of the one Part and Wintershall of the other, and does not say prædict. Wintershall, for Want of which he does not appear to be the same Person: This Exception was not much heeded. Cases cited pro and con were Yelv. 103. 3 Cro. 913. Bridgm. 99. Dyer 70. Hard. 178.

Whereas Proviso goes by Way of Defeazance of a Covenant, it must be pleaded on the other Side; otherwise where by Way of Explanation or Restriction of the Covenant.

3^{dly}, It was objected to the Plea, That the Notice is not said to be given in an acting Week; and tho' it was urged to be by Way of Proviso, and therefore ought to come on the other Side (5 Co. 78. 3 Cro. 405. 7 Co. 10. Poph. 28. Plow. 376. 1 Leon. pl. 202.) and that the Plea said he had Notice secundum formam & effectum articulorum; yet Holt C. J. answered, That where the Proviso goes by Way of Defeazance, it must be pleaded by him that takes Advantage of it; but this is not so, but alters the Sense of the Covenant, by explaining and tying up the Notice to a particular Time, which would not have been understood on the general Covenant, by which Means it becomes Part of the Covenant, so that you must plead accordingly; and secundum formam & effectum articulorum is only Matter of Conclusion, which cannot serve without Premises. And upon this single Point, Judgment was given for the Plaintiff.

Lacy versus Kynaston. Pasch. 13 W. III. B. R.

THE Plaintiff brought Covenant as Administrator to Lacy, and declared on the same Indenture in the Case before Killigrew and Kynaston, and they ex una parte, and Lacy ex altera parte, reciting former Articles, and they hereby covenant jointly and severally with Lacy, That if he be minded to leave ailing, and gives three Months Notice thereof to the Company, he shall be paid 6 s. 3 d. per Day for his Life, and that within three Months after his Death, his Executors shall be paid 100 l. And that if he die without such Notice, his Executors should be paid 100 l. within six Months after his Death, in the Payment whereof the Breach was assigned: The Defendant pleaded Oyer, and pleaded another Deed made the same Day and Year, whereby Lacy and others covenant jointly and severally with the Defendant, that if he left off ailing, and gave Notice, he should be freed and indemnified of and from the said Covenant, and abers he left off and gave Notice, and became discharged, and so prayed Judgment of the Action. The Plaintiff demurs, &c. And the Question was, Whether this was a Covenant or a Defeazance? And the Court held,

1st, That this Covenant in its Nature was not a Defeazance, because it wanted Words of Defeazance, viz. that the Thing be void.

2dly, If A. and B. are jointly and severally bound to H. and H. covenants with A. that he will not sue A. this is not a Defeazance, for still there is a Remedy on the Bond against B. otherwise if A. only had been bound, for then such Covenant excludes him from any Remedy for ever, to avoid Circuity of Action. Vide 43. Aff. pl. 44. This Difference being applied to the principal Case rules it, and it is but reasonable; because to construe this to be or entire as a Release or Defeazance, is to discharge it; otherwise of a Covenant. 34 H. 8. Br. Estranger al fait. Lit. Sect. 376. Inst. 232. Hob. 66.

(3.)
Defeazance must contain proper Words of Defeazance.
Vid. 9 Co. 52.
3 Lev. 275.
1 Show. 151.
2 Lev. 214.
215, &c.
Ant. 573. S. C.
3 Salk. 296.
Cas. B. R. 224.
415, 548.
Holt 178, 218.

1 Rol. 939.
1 Show. 46.
3 Cro. 623.
Comb. 123.
3 Cro. 352.

3 Lev. 275.
1 Show. 46.
47, 151.
2 Lev. 214.
215, &c.
Bond from A. and B. to H. joint and several Covenant from H. not to sue A. is not a Defeazance.
S. C. ant. 573.

Topham versus Tollier. Trin. 1 Ann. B. R.

Post 578.

DEBT on a Bond against an Administrator; the Defendant pleaded a Release, whereby the Plaintiff reciting there several Controversies between the Defendant and him about Legacy, and the Right of Administration releases to the Defendant all his Right, Title, Interest and Demand of, in, and to the personal Estate of the Intestate. Upon Demurrer this was held no Plea; for per Holt C. J. There is a Difference between a Release of all Demands to the Person of the Administrator,

(4.)
Release of all Demands to the personal Estate of the Intestate, releases not a Bond before Judgment and Execution.
3 Leon. Case 105. cont.

Vide 10 Co. 48 to 52. Holt 621. S. C.

Cro. El. 897. strator, as in Yelv. 214. and to the personal Estate, as in the
 Lutw. 249, Case; for the Bond is not any Right or Demand to the perso
 250. nal Estate, till Judgment and Execution sued out.
 1 Lev 99, 272.
 2 Lev. 210.
 Post 578.

Vide Post
 Reversion,
 pag. 590.

REMAINDER.

Corbet *versus* Tichborn. Pasch. 6 W. & M. B.R.

(1.)
 Attainder,
 Vide Post
 630.

Ejectment, and Trial at Bar; the Case was, J. S. was
 Tenant for Life, Remainder to his Wife for Life, Re
 mainder to his first, second, &c. Sons in Tail, Re
 mainder to the right Heirs of J. S. The said J. S. com
 mits Treason, and then has a Son, and then is attainted; an
 the Court held, That whether the Son was born before or after
 the Attainder, the contingent Remainder to him was not dis
 charged by the vesting in the Crown during the Life of J. S. be
 cause of the Wife's Estate, which is sufficient to support it.

Ant. 427, 565.
 Vide Post
 618, &c. ib.
 3 Lev. 284.
 3 Mod. 296.

(2.)
 Surrender of
 Tenant for
 Life being
 Non Compos
 to a Remain
 der-Man is
 void, and
 cannot bar
 contingent
 Remainder.
 Right of En
 try will sup
 port contin
 gent Re
 mainder,
 Right of
 Action not.

Thompson *versus* Leach. Hill. 9 Will. III. B.R.

A Devise was to Simon Leach for Life, Remainder to his
 first, second and third Sons, &c. Remainder to Sir Simon
 Leach in Tail, the Remainder to the right Heirs of Simon Leach.
 Simon Leach the Tenant for Life surrendered his Estate by Deed
 to Sir Simon Leach, and after that had a Son born and died
 and the Son brought an Ejectment against Sir Simon, and Sir
 Simon's Father was found to be Non Compos at the Time of the
 Surrender. Et per Cur', Taking the Surrender to be voidable
 only, it was held, That the Plaintiff could have no Title; for
 his Estate in Remainder was a contingent Remainder, and if the
 precedent Estate was gone and determined by the Surrender, the
 Contingency could not arise. There must be a particular Estate
 actually in Being, or a present Right of Entry, [Vide Bigot and
 Smith's Case, Cro. Car.] And it is not enough that there

1 Venr. 306.
 1 Roll. Rep. 177. Eq. Ab. 178. p. 3. S. C. 3 D. 164. p. 13. 3 Salk. 300. 1 Show. 296. 3 Mod. 2
 301. 3 Lev. 284. Show. P. C. 150. 2 Venr. 198. Comb. 438, 468. Carth. 211, 250, 435. H
 357, 623, 665. Cases B. R. 475.

a Right of Action, but it must be a Right of Entry: And they held, that it was not for Want of Right to the Thing, but of Capacity to do the Act, that a Madman is hindered to avoid his own Grant. 1 Cro. 102. 2 Saund. 387. 3 Keb. 2. And if this had been done in the Life of the Surrenderer by Inquisition, that would have preserved the contingent Remainder; but that cannot be done now, because the particular Estate is determined. To show this, Holt C. J. said,

If there be Tenant for Life, with a contingent Remainder to H. and Tenant for Life is disseised, and after that a Discent cast, and five Years expire, now the contingent Remainder is gone, for there is nothing now to support it, the Right of Entry being turned into a Right of Action: But before the Discent the Right of Entry was sufficient.

But they held the Surrender in this Case to be merely void, so that the particular Estate remained in him, notwithstanding the Surrender, and the contingent Remainder rightly vested.

If there be Tenant for Life with a contingent Remainder, and he makes a Feoffment in Fee upon Condition, and the Contingency happens before the Condition broken, the contingent Remainder is destroyed; for there must be a particular Estate, or a present Right of Entry when the Contingency happens; but if Tenant for Life enters for Breach before the Contingency happens, the contingent Remainder is revived, and may vest.

Weeks *versus* Peach. Mich. 13 Will. III. B. R.

Devised out of his Lands a Rent to one for Life, with Remainder over, &c. And Shower objected, That there could not be a Remainder of a Rent de novo; for there cannot be a Remainder where there cannot be a Reversion. But per Holt C. J. There may be a Remainder of a Rent de novo; for the Intent of the Party gives it first a Being for the Whole, and when the lesser Estates are carved out of it. Vide 2 Lutw. 1225.

1 Mod. 218. 2 Lev. 80, 88. Carter 52. 2 Keb. 89.

(3.)
Remainder
may be of
a Rent de
novo.
Vid. ant. 466.
1 Lev. 144.
Q. Chan. Cas.
79, 80.
1 Sid. 285.
6 Mod. 112.

RENTS.

1 Lev. 22, 25,
43, 144, 170.
2 Lev. 30,
80, 240.
3 Lev. 39,
150, 233,
295.

RENTS.

Stephens & Ux' *versus* Snow. Hill. 2 W. & M. B. R.

(1.)
Growing
Rent not re-
leased by Re-
lease of all
Demands.
Vid. ant. 575.
pl. 4.
10 Co. 48
to 52.
1 Lev. 99,
100.
2 Lev. 210.
1 Vent. 314.
1 Sid. 141.
2 Cro. 170.

THE Plaintiff declared upon a Lease for Years, reddend 30 s. at Lady-Day and Michaelmas, and assigns in Breach Non-payment of a Year's Rent, due and ending at Lady-Day 1689. The Defendant pleaded a Release dated the 18th Day of November 1688. of all Demands and upon Demurrer, Judgment was given for the Plaintiff for the growing Rent not due, which is incident to the Reversion, was not discharged; tho' the first half Year's Rent, which was a Duty demandable, was released; but here the Release being pleaded as a Bar to all, which it is not, the Plea is naught and Judgment must be given for the Plaintiff.

Litt. Sec. 510. 1 Mod. 95. 2 Cro. 486.

Lord Rockingham & al' *contra* Oxenden & al'. Coram Trevor, Master of the Rolls, 1711.

(2.)
1 Will. Rep.
177. S. C.
by the Name
of Penrice.
Cro Jac. 310.

THE Lessor dies upon Michaelmas-Day, between three and four in the Afternoon, before Sun-set, the Rent being reserved payable on Michaelmas-Day: The Question was, Whether the Executor or the Heir, or, which is the same, the Jointure of the Lessor should have this Rent? The Executor insisted that this was the Rent-Day; that it might have been paid in the Morning, and that a Release upon such Payment had been Discharge; and they denied the Opinion of Hale in 1 Saund. 2 and said, that so it was held by the Judges of Assize at Durham viz. Baron Bury, &c. But on the other Side it was argued and decreed, That the Rent should go to the Heir or Jointure, because at the Time of the Death of the Lessor, there was no Remedy nor Means to compel the Payment thereof. Vide 10 Clun's Case, 2 Bulst. 293. Plowd. 172, 173. 1 Inst. 202. 1 K. 59. 1 Sid. 162. 2 Cro. Fox *versus* Whichcot.

R E P L E A D E R.

Vide Cro.
El. 318, 883.
3 Co. 52.
1 Leon 79.
Lat. 248.

Staple *versus* Hayden. Trin. 2 Ann. B. R.

S. C. Ante
216, 173.

It was laid down by the Court in the Case of Staple and Hayden, Trin. 2 Ann. B. R. Which see Title Default, p. 216. First, That at Common Law a Repleader was allowed before Trial, because a Verdict did not cure an immaterial Issue: But now a Repleader ought never to be allowed before Trial, because the Fault of the Issue may be helped by the Trial by the Statute of Jeofails.

6 Mod. 1, 2, 3.
3 Salk. 121.
Holt 217.
Repleader
not allow'd
before Trial.
1 Lev. 32.
2 Lev. 12,
142, 164.
If denied
where grant-
able, Error.
6 Mod 2,
102.
Parties begin
de novo at
the first Fault.
1 Mod. 2.

2dly, That if a Repleader be denied where it should be granted, or granted where it should be denied, it is Error.

3dly, That the Judgment of Repleader is general, viz. Quod partes replacitent; and the Parties must begin again at the first Fault, which occasioned the immaterial Issue: That if the Declaration be ill, the Bar ill, and the Replication ill, the Parties must begin de novo; but if the Bar be good and the Replication ill, at the Replication. Vide 3 Keb. 664.

4thly, No Costs are allowed on either Side.

5thly, That a Repleader cannot be awarded after a Default.

No Costs.
Not after
Default.
6 Mod. 2, 3.
1 Keb. 23,
39, 89, 90.
3 Lev. 20,
440.
Dyer 117,
118.
2 Saund. 318.
319.
1 Salk. 173.

See the Form of a Repleader. Lutw. 1622.

Vide 1 Lev.
90.
Raym. 33,
34, 255, &c.
6 Mod. 68,
81, 103, 158,
189.

Replevin and Homine Replegiando.

[*Vide Title Avowry.*]

Halet *versus* Burt. Hill. 8 Will. III. B. R.

(1.)
Bailliff of a
Hundred
cannot grant
Replevins
out of Court.
5 Mod 252.
S. C.
S. C. Carth.
380
1 Inst. 145.
2 Inst. 139.
Co. Ent. 284
Dyer 245.
F. N. B. 73.
Skin. 674.
3 Salk. 272.
Cafes B. R.
120.
Ante 394.

IN Trespass for taking, &c. The Defendant justified that the Place where was a Hundred, and Time out of Mind had Court of all Actions, Replevins, &c. grantable in or out of Court and that a Replevin was granted to him by the Bailliff out of Court, virtute, &c. It was questioned, Whether a Hundred-Court could prescribe to hold Plea of Replevins, because the County-Court could not hold Plea of them at Common Law, but were enabled by the Statute, which extends not to the Hundred-Court? But per tot. Cur' clearly; Supposing they may grant them in Court, yet they cannot prescribe to grant them out of Court.

Richards *versus* Cornforth. Mich. 9 Will. III. B. R.

(2.)
Avowry for
Rent, where
Part is not
yet due, is
Error; but
might be cu-
red before
Judgment, by
abating the
Avowry as
to that.
Vide Cro.
Jac. 473.
S. C. 5 Mod.
363.
call'd Ric-
cards *versus*
Cornforth.
Moor 281.
Mob. 133,
208.

ERROR of a Judgment in Replevin, wherein the Defendant avowed for Rent and had Judgment; and now Mr. Cawthell assigned for Error, that Part of the Rent became due after the Distress taken, for the Distress was made the 26th Day of September, 7 W. 3. which was three Days before Michaelmas whereas the Defendant had avowed for that Michaelmas Rent Et per Cur', This is naught; for the Judgment is to have Return irreplevisable, i. e. that he shall have the Distress as Pledge, till all the Rent avowed for be paid, and that was more than was due at the Time of the Distress. In this Case the Avowant before Judgment should have abated his Avowry, quod the Michaelmas Rent, and taken Judgment for the rest; but the Defendant getting his Avowry mended in C. B. the Roll was amended here in B. R. and so the Error was cured.

Moor *versus* Watts. Mich. 12 Will. III. B. R.

UPON a Habeas Corpus it was returned, that Watts was in Custody by Virtue of a Capias in Withernam; and the Case was, That upon a Homine Replegiando, the Sheriff returned an Inquisition, finding that the Party was elaigned, whereupon a Withernam issued, returnable octab. Martini, which was not yet come; but the Defendant was taken thereupon and moved to be bailed, and the Matter was four Times moved and debated. It was objected, That he could not be bailed upon the Withernam; for it was an Execution, and he had no Day in Court, and the Plaintiff could not have a new Withernam: And the Lord Gray coming into Court upon an Elongata found, was committed and lay by a Fortnight: Also they cited Raymond 474. and said the Return of the Elongata was a kind of Conviction, and the Defendant thereby estopped from pleading Non cepit: That which seemed to be the Sense of the Chief Justice, to which the rest agreed, was,

1st, That a Homine Replegiando does not differ from a common Replevin de Averiis; and that in a Replevin for Cattle, the Sheriff must either return a Deliberari feci, or an Excuse thereof, viz. That no Body came to shew him the Cattle, or Elongata; But he cannot return they were not taken, for that goes to the Point of the Writ which the Defendant is to falsify, and not the Sheriff; that therefore the Sheriff must return an Elongata where he cannot make a Deliberance, and the Defendant is not concluded by the Return of the Elongata to plead Non cepit, because it was necessary, and he could not avoid it: And as for this Reason, no Action lies against the Sheriff for a false Return of an Elongata, where he cannot make Deliberance; so the Defendant is not concluded to plead Non cepit to the Action, because he cannot falsify the Return.

2^{dly}, That the Capias in Withernam does not alter the Case, nor make it the stronger, because it is the meer Consequence of the Return of the Elongata; therefore he is no more estopped by the Withernam than he was by the Elongata to plead Non cepit, or to claim Property if it were a common Replevin de Averiis.

3^{dly}, That in Replevin de Averiis after an Elongata and Withernam, if the Defendant pleads Non cepit, he shall have his Cattle again, and even a Capias in Withernam against the Plaintiff for them; so it is if the Defendant claims a Property. Since the Taking of Property is in Question, the Law deems it reasonable that the Defendant should have his Goods again during the Dispute: And by the same Reason in a Homine Replegiando

(3.)
Homine replegiando.
See 2 Show.
218, 221 to
232.
6 Mod. 84.
Lit. Rep 54.
3 Leon. Cal.
323.
Farell. 9.
S. C. Cases
B. R. 423.
Holt 626.
Lilly Ent.
293.

The Sheriff cannot return they were not taken.

After Elongata returned, and Withernam awarded, the Defendant may plead Non cepit. See 2 Show. ut supra. Farell. 17.

Upon pleading Non cepit or claiming Property, the Defendant shall have his Goods again. So in Homine replegiando he shall be bailed on Non cepit.

Withernam
is meſne Pro-
ceſs.
Vide 2 Show.
218, &c.
6 Mod. 84.
Farcll. 17.

There may
be a new Wi-
thernam after
the Defen-
dant has been
bail'd upon
the firſt.

If on Elonga-
ta returned
the Defen-
dant pleads
Non cepit,
no Withernam
shall
iſſue.
Vide 6 Mod.
84.
Lit. Rep. 54.
3 Leon. Caf.
323.

In Homine
replegiando,
Defendant
cannot be
bail'd before
the Return
of the Wi-
thernam.

plegiando the Defendant, upon pleading Non cepit, ſhould be reſtored to his Liberty; and the Court denied the Withernam to be an Execution, for that cannot be before Judgment, and held it only to be a meſne Proceſs: Alſo they diſliked the Caſe in Raymond, and the Caſe of the Lord Gray, but affirmed the Caſe in the Reg. 79. a. and thought it made for them, and that upon Non cepit pleaded, he might be bailed. Keil. 71. a. F. N. B. 74. were cited. Adding this farther Reaſon, that hereby the Suppoſal of the Writ is denied and balanced, and the Matter ſtands indifferent, according to the Rule of Bailing laid down by my Lord Coke, upon Weſt. 1. c. 15.

4thly, The Court held, That there might be a new Withernam, but obſerved it was not neceſſary nor material to determine that in this Caſe; for the Bail muſt be in a Sum certain, with Condition that he appear de die in diem; and if Judgment againſt him, that he render his Body in Withernam ibidem remanſurus quouſq; he render the Party, and permit him to go at large; therefore if he be rendered again, he is in Cuſtody upon the Withernam, as before. So if H. brings an Audita Querela and is bailed, and Judgment is againſt him, when H. is rendered back, he is in Cuſtody again upon the firſt Execution; and ſo in an Appeal of Murder, if the Defendant be bailed and makes Default, Proceſs ſhall go againſt the Bail, and alſo a Capias againſt him; but if he render, he is in Cuſtody upon the Appeal. Pet Note; Upon his Default a new Capias lies againſt him. So in this Caſe if before the Withernam the Defendant had pleaded Non cepit, that had ſtopped the Withernam; but if that had been found againſt him, the Impediment was removed, and a Withernam ſhould have gone; ſo here, if after the Withernam, he plead Non cepit, which is found againſt him, and he is not rendered, a Capias in Withernam lies againſt him, as well as Proceſs againſt his Bail; for there is nothing to hinder it. Vide H. 4. 2. T. Mainprize 23.

The Plaintiff's Counsel ſeeing that by the Opinion of the Court the Defendant could not be bailed, unleſs he pleaded Non cepit, would not deliver a Declaration; which the Court ſaid, was putting a Difficulty upon them; and upon this, in order to ſue the Plaintiff, the Queſtion was, Whether the Plaintiff was demandable upon the Withernam? Alſo there was a former Queſtion, Whether he might be bailed upon the Habeas Corpus before the Return of the Withernam?

As to the laſt Point the Court held, That before the Return of the Withernam the Defendant could not be bailed; and ſo in an Appeal of Murder, the Defendant ought not to be bailed before the Return of the Writ; and tho' this has been done in an Appeal by ſome Judges, yet per Holt C. J. It was done minus rite; he would not therefore allow Bail before the Return

the Withernam, and said, that in a Homine Replegiando after See 2 Show. 218 to 232.
an Elongata returned, if the Defendant comes in gratis, and
pleads Non cepit, he shall not be put to find Bail; (Ratio vide-
tur esse, because hereby the Withernam is stopped or suspended,)
but if he comes in in Custody upon a Capias in Withernam, he must
give Bail, and cannot be admitted to that till he call for a De-
claration, and plead Non cepit.

As to the other Point the Chief Justice said, that whenever a Plaintiff is
arrested, which is returnable, the Return Day is a Day demandable
on the Re-
turn of the
Withernam,
and may be
non-suited for
not appear-
ing.
to both Parties to appear, and tho' the Writ be returned not
served, the Defendant may appear to prevent any ill Consequence:
As to prevent a Capias, 5 E. 4. 69. So here to save himself on a
Withernam. Respond. 57. 7 E. 4. 5. Upon a Distringas proximas
villas, &c. the Defendants have no Day, yet they may appear
and traverse. In a common Replevin the Original gives no
Day, for that is Vicontiel; so is the Alias, but the Pluries is re-
turnable here; and tho' there is no Summons nor Attachment
in the Writ, yet the Day of the Return is a Day to the Par-
ties, and the Entry is, that the Defendant attachiatus est ad re-
spondend. de pl'ito quare cepit, &c. And the Reason is, because
tho' in Truth there was not actually an Attachment, yet virtual-
ly and in consequence of Law it is so, he being bound to appear
upon the Peril of a Withernam. And tho' the Plaintiff be ab-
sent, he may make an Attorney: Hereupon he was called and
non-suited, for otherwise the Defendant might lose his Liberty for
ever by such a Contrivance.

Horn versus Lewin. Hill. 12 Will. III. B. R.

IN Replevin the Defendant made Conusance for 100 l. de red-
ditu onerat. in Aretro pro uno Anno. The Plaintiff as to
10 l. pleads de injuria sua propria absque hoc quod fuit in Aretro,
and as to the other 50 l. that he was ready on the Land till
Sun-set, and none came to receive it, and that he is still ready to
pay it, and brings the Money into Court: Defendant demurs spe-
cially to the first Plea, quia attingit ad generalem exitum: And as
to the other 50 l. he takes it out of Court, & pro dampnis dicit
quod non obtulit, &c. and upon this the Plaintiff demurred.
This Case being several Times spoken to, it was held,
1st, That de injuria sua propria absq; hoc, &c. was an imper-
fect round-about Way of pleading the general Issue, and that
it amounted to no more than the General Issue, Riens in Arriere,
and consequently was ill upon a special Demurrer: Also this Cra-
pule put the Defendant to an unnecessary Replication; therefore
as to the 50 l. 'twas clear for the Defendant.

In a Plea in
Bar of Ten-
der of Reht
in Replevin,
the Money
ought not to
be brought
into Court.
S. C. 3 Salk.
273, 544,
356. Cases
B. R. 352.
Vide Post
596, 597.
Raym. 419.
1 Inst. 34.
1 Vent. 222.
De injuria
sua absq; hoc
quod fuit in
Aretro, a-
mounts to
the general
Issue.

Vide 3 Lev.
104, 105.

2dly, As to the other 50 l. the Court held, 1st, That the bare paratus was not sufficient, and did not amount to a Tender without an obtulit, and therefore his being ready on the Land since he did not tender the Rent, did not oblige the Grantee to demand the Rent before he made Distress. Hob. 207. 1 Ven. 322. And so the Distress was lawful without a Demand, and then the Avowry or Conusance of the Defendant stands unanswered. 2dly, The Profert of the Money was impertinent and idle, Keil. 20 Dy. 227. 2 E. 4. 25. Pl. 15. 2 Cro. 126. In Debt upon Bond, there might be a Profert, to save Damages; because there the Money is the Thing in Demand: But it cannot be in an Avowry to a Replevin, because the Avowry is to justify the Taking the Cattle; and whether the Money is paid or not, is not the Question; but if the Distress was rightfully taken, the Avowant must have a Return; if wrongfully, he must answer the Plaintiff Damages. If then the Profert was superfluous, so was the Avowant's accepting it, and Judgment must be given for the Avowant on the Avowry, by which it appears that Rent was behind and the Distress lawful, and to which there is no sufficient Answer.

(5.)

Pratt *versus* Rutlich. Trin. 13 Will. III. B. R.
Vide *this Case*, Title Avowry, Pl. 6. Pag. 95.

OF Property claim'd in Replevin, 6 Mod 69, 81, 139, 141
1 Lev. 90. Lutw. 1316.

A Bailiff pleads property in Replevin in a
Stranger's name
Oldham v. Hamstead

R E Q U E S T.

Vide 1 Lev.
68, 85, 289.
2 Lev. 198.
3 Lev. 363,
366.

Fitz-Hugh *versus* Dennington. Mich. 3 Ann. B. R. S. C. 6 Mod.
277, 259.
3 Salk. 309.
Holt 68.

DEBT on a Bond, with Condition, reciting, That the Plaintiff was Apprentice to the Defendant for seven Years; and that if the Defendant at the End of seven Years should procure him to be made free of the Joiners Company (if requested) then the Bond to be void. The Defendant pleaded, That at the End of seven Years or afterwards hucusq; he was not requested. The Court held a Request necessary, for the Condition was to do a collateral Thing; and as it is Part of the Condition it must be averred: And here a Request within the seven Years, when the Thing was not to be done, shall not be intended per Cur'. Afterwards this was moved again by Broderick, who urged, That the Defendant should have pleaded he was not requested generally, and that the Request might have been before the End of the seven Years. Et per Cur', 'Tis not to be done post finem, but ad finem, and the End of a Thing is always Part of that of which it is the End, and he was to be made free the last Day of the seven Years, and should have requested some convenient Time in that Day that the other might have a reasonable Time to do it in. Adjudged on a Writ of Error of a Judgment in the Marshal's Court for the Plaintiff, and the Judgment reversed, per totam Curiam.

Condition to
do an Act at
the End of se-
ven Years up-
on Request;
Request must
be made on
the last Day.
See 1 Lev.
68, 85.
Pal. 321.
Farell. 143,
144.
Aley 25.
Stry. 49, 74.
Yelv. 66.
1 Cro. 179,
280.
2 Cro. 183,
652.
6 Mod. 200,
227, 260.
1 Saund. 35.

R E S.

R E S C U E.

See Cro.
Car. 109.
Cro. Jac.
345, 486.
2 Hawk. P.
C. 139, &c.

Dominus Rex *versus* Belt. Mich. 8 Will. III. B. R.

(1.)
Where the
Rescuer shall
be discharg-
ed upon Affi-
davits.
Vid. pl. 3.
infra.

IN the Case of a Rescue there are two Ways of Proceeding. If the Rescous is returned to the Philazer, and Process Outlawry issues, and the Rescuer is brought into Court he shall not be discharged upon Affidavits; but where upon the Return of a Rescue an Attachment is granted and the Party examined upon Interrogatories, upon answering them he shall be discharged.

See Ray. 161.
1 Lev. 214.
2 Lev. 26, 28.
3 Lev. 46.

Anonymus. Trin. 12 Will. III. B. R.

(2.)
Return that
the Bailiffs
had him in
Custody of
the Sheriff,
and H. res-
cued him out
of the Cust-
ody of the Bai-
liffs, ill for
Repugnancy.
Vide ante
436, 432.
Post 589.
1 Show. 180.
Lutw. 130.
6 Mod. 211.
3 Mod. 114,
115.

THE Sheriff returned virtute brevis mihi direct' feci Warrant' A. & B. ballivis meis qui virtute inde ceperunt Defendant & in custodia mea habuerunt quousq; such and so rescusserunt him ex custodia ballivorum meorum: And Mr. B. moved to quash it, and it was quashed per Cur'. For per Holt J. When the Bailiffs have arrested the Party, he is in fact in Truth in their Custody; but in Law, he is in the Custody of the Sheriff: An Answer either Way is good, viz. That he was rescued out of the Bailiff's Custody, or that he was rescued out of the Sheriff's Custody; but to say he was in the Custody of the Sheriff, and yet rescued out of the Custody of the Bailiffs, repugnant.

Anonymus. Hill. 3 Ann. B. R.

(3.)
Attachment
for a Rescue
never grant-
ed upon Affi-
davits.

Fine for a
Rescue.

UPON an Affidavit of a Rescue, an Attachment was granted against the Rescuers, and this was a Rescue upon mesne Process; but denied; for per Holt C. J. The Rescue must be returned upon the Writ, and the Motion and Attachment founded upon that; but it is never the Course to grant it upon Affidavits. Sir Samuel Astry said, it was the constant Course upon the Return of a Rescue, to set four Nobles Fine upon each Offender and that he had it from Mr. J. Twisden. Hill. 11 Will. III. B. R. Vide 2 Jo. 198.

See 6 Mod. 141. a Difference where 'tis on mesne Process, where on an Execution.

RESTITUTION.

Vide Raym.
85.
3 Lev. 312.

Rex & Regina *versus* Leaver. Trin. 3 W. & M. B.R.

IN an Indictment of Barretry, the Defendant was convicted and fined 100l. which was levied by the Sheriff, and paid into the Hands of the Collectors; afterwards the Judgment was reversed. Pemberton moved for a Rule for Restitution against the Collectors. Holt C. J. It cannot be, for they are not Party to any Record here: You ought to sue out a special Sci. fa. and make them Parties, as in 1 Cro. 328. but this he also doubted, saying, this Case differed: He put this Case: A Reco- veror in Ejectment is disseised, or makes a Feoffment; afterwards the Judgment is reversed: Will a Writ of Restitution lie? He said it would not, because the Disseisor or Feoffee are Strangers to the Record, which Pemberton agreed. If a Feme recover Damages and then marries, and the Judgment is reversed, Resti- tution lies against her and her Husband; but they are Parties: and the Motion was denied.

(1.)
Writ of Re-
stitution lies
not against
any that are
not Parties to
the Record.
Raym. 85.
S. C. 2 Lev.
223.
3 Keb. 231.
1 Show. 261.
Comb. 47, 58.
Skin. 32.
Tem. 320.

Dominus Rex *versus* Toslin & al'. Hill. 10 Will. III. B. R.

Vide 5 Mod.
443, 444.

A Motion was made for Restitution, upon quashing an In- quisition of Forcible Entry; the Case was, That the Lessor pressed the Lessee for Rent, and while he was in Custody entered the House under Pretence of Forfeiture by a Proviso in the lease; but the Motion was denied, because here appears a Title standing out; which he shall not avoid by sinister Means, but ought to pursue his Remedy by Ejectment according to Law: otherwise, had no Title appeared.

(2.)
Restitution
denied upon
quashing In-
quisition of
Forcible En-
try, Lease for
Years stand-
ing out.
Cro. El. 466.
1 Leon. Cas.
461.

Domina Regina *versus* Winter. Pasch. 4 Ann. B. R.

UPON a Motion made by Mr. Broderick for a Procedendo in a Case of an Inquisition taken by Justices of Peace, and a Forcible Detainer found, and a Warrant granted by them to restore the Possession, which was suspended by a Certiorari ss. Vol. II.

A a

sued

(3.)
Traverse to
Inquisition of
Forcible En-
try is a Su-
peredeas to
Restitution.
S. C. Holt
324.

sued out of this Court, it was said by Holt C. J. That if the Party against whom the Inquisition was found would traverse the Force, that was always a Reason to stay Restitution; nay, that had been held a Superseas to the awarding Restitution, and that it was so in Sir Richard Bray's Case: There an Inquisition found a forcible Entry: The Defendant offered immediately before the Justice to traverse the Force, the Justice refused the Traverse and granted Restitution; and Kelynge C. J. granted Re-restitution. He said also, that all Inquisitions of Office are of common Right traversable; so is a Distringas proximas villatas, in Case of pulling down hedges in the Night, on the Statute of Westm. tho' the Statute mentions no such Thing: And if in Case of an Inquisition of forcible Entry taken before a Justice of Peace, the Defendant tenders his Traverse immediately, the Justice must adjourn to another Day, and award Process to return a Jury. Powel J. said, That in the Case in Dyer 122. a Traverse the Indictment was held to be a Superseas only at Election, but lately it had been held an absolute Superseas: And he said also That if H. licence another to enter into his Land and take the Profits, 'tis a Lease at Will; and if the Licence was for a Year 'tis a Lease for a Year; otherwise of a Licence to hunt: And if H. licence another to come upon his Dock, (which was the principal Case) and carry on his Trade, 'tis a Lease; because 'tis the proper Profits of a Dock. Note; Trin. 11 W. 3. Rex vs. Scarlet, The same Question was, viz. Whether Re-restitution should be granted, because the Justice had refused a Traverse to an Inquisition of forcible Entry? But not resolved. 1 Sid. 282 Keb. 571. Dy. 122. Sty. 359, 360. were cited.

Vide Cro.
Jac. 246, 698.
Cro. Car.
328.

(4.)
Where the
Money recovered in a
Judgment
appears by
Record to be
paid, Restitution
shall be
without a
Scire facias;
otherwise
where levied
only.

Anonymus. Pasch. 4 Ann. B. R.

WHERE the Plaintiff has Execution, and the Money is levied and paid, and that Judgment is afterwards reversed; there, because it appears on the Record that the Money was paid, the Party shall have Restitution without a Scire facias, where there is a Certainty of what was lost; otherwise where it was levied but not paid; there must then be a Scire facias, suggesting the Matter of Fact, viz. the Sum levied, &c. But where Judgment is set aside after Execution for Irregularity, there needs no Scire facias for Restitution, but an Attachment shall be granted upon the Rule for Contempt, if there be not a Restitution. Holt C. J.

Retorn of Writs.

[*Vide Title Writs.*]

Vide 4 Leon.
Caf. 69, 145,
223.
Cro. El. 310.
Cro. Car.
189.
Post 699.

Wilson versus Law. Mich. 6 W. & M. B. R.

WILSON brought an Appeal of Murder against John Law for killing his Brother Robert Wilson, and declared against him: The Defendant prayed Oyer of the Writ and Return; and having Oyer, demurred to the Writ and Return, and to the Felony pleaded over, Not guilty: Exception was taken, 1st, That the Writ commanded the Sheriff, quod attach. Johannem Law, &c. And the Sheriff had returned attachiari feci: This they pretended was no Answer to the Writ, the Injunction whereof is personal; but the Court held it well enough, for the Sheriff was not bound to execute it in Person, but might do it by his Bailiffs. Dyer 241. 2 Ro. 457. And what the Bailiffs do by the Sheriff's Warrant, is done by the Sheriff, Nam qui facit per alium, facit per se. If he had returned attachiatus est, it had been good: Captus est is a good Return to Capias: Kitch. 258. For if there is the Substance, it is no Matter for Form, as 1 H. 6. 6. a Scire facias was returned, Scire feci A. B. without adding infra nominat'. Yet because it was said to be virtute brevis prædict. prout mihi præcipitur, it was adjudged good. 2dly, The Sheriff returned, Ita quod Corpus ejus paratum habeo ubicunq; and it was objected this was Nonsense, and also impossible. Sed per Cur', The Return is good without it; 'tis therefore but Surplusage, which will not vitiate a Writ or Indictment, much less a Return, which requires not such Preciseness in Form. 3 Cro. 893. 2 Ro. 460.

(1.)
Attach. feci
good in a
Return.
Vide Cro.
El. 13. pl. 7.

Surplusage in
Return re-
jected.
Vide ante
430, 432,
436, 586.

See more of this Case, Title Appeal, Pl. 2. pag. 59.

Palmer versus Price. Mich. 7 Will. III. B. R.

AN Action was laid in Staffordshire, and Judgment for the Plaintiff; he sued out a Fieri facias with a Testatum into Worcestershire; and now it was moved that this was irregular and ought to be set aside, because no Fieri facias had ever gone into Staffordshire.

(2.)
Process whereon to ground Testatum is return'd by the Attorney of Courfe.
Ante 515.

Vol. II.

A a 2

Staffordshire; and the Sheriff of Staffordshire made Affidavit that he never returned any Fieri facias in the Cause: Sed non allocatur for the Fieri facias upon which the Testatum is founded, is returned of Course by the Attornies themselves, as Originals are if you search the File you may find one, and that is sufficient.

REVERSION.

Abbot *versus* Burton. Trin. 7 Ann. C. B.

Vide ante
Remainder,
pag. 576.
1 Saund. 260.
261.
1 Salk. 231.
3 Lev. 94,
209, 233,
406.

H. seised of Lands a parte materna, limits several Estates with Remainder to the Use of his right Heirs. The Heir a parte materna shall have it, being the ancient Use.
2 Mod. 286.
1 Co. 105.
Cro. Car. 161.
2 Lev. 60, 79.
Cro. Eliz. 840.
S. C. Rep. A. Q. 181.

No Difference between express and implied Use.
Post 675, 676.

J S. being seised in Fee of certain Lands descended to him a parte materna, covenants to levy a Fine thereof to A and B. to the Use of them and their Heirs, to the Intent that a Common Recovery should be suffered against the said Conusees to the Use of J. S. for Life, Remainder to his Wife for Life, Remainder to his first, second and third Sons Tail, &c. Remainder to the right Heirs of J. S. The Fine accordingly levied, and then the Common Recovery is suffered against the Conusees of the Fine as Tenants to the Praecipe with Voucher of J. S. Afterwards J. S. and his Wife die without Issue and the Lessor of the Plaintiff is Heir of J. S. a parte materna and the Defendant Heir general. This Matter being found upon a Special Verdict in Ejectment, the Question was, Whether this Limitation of the Remainder to the Use of the right Heirs of J. S. did create a new Estate descendible to the Heir general, or was only the ancient Use? And the Resolution of the Court delivered by Trevor C. J. was for the Plaintiff, that it was the ancient Use, and that there was no Difference whether upon the Conveyance of an Estate, any Part of the Use reserved by Implication of Law, and when it is reserved by express Declaration to the Party from whom the Estate moved; for there is no Reason that a greater Alteration should be wrought in the Use which a Man by express and plain Words reserves to himself upon a Conveyance of his Estate, than when the Law makes a Construction of this Intent to reserve it, not from express Words, but from other Circumstances and Presumptions, which

in the Consideration of Law do as strongly and manifestly declare his Mind. And for this was cited the Case of Godbolt and Freestone, 3 Lev. 406.

But the Difference whereby that Case was endeavoured to be distinguished from the Case in Question was this: That was upon a Feoffment to the Use of the Feoffor for Life, Remainder to his first, second, and other Sons in Tail, Remainder to the right heirs of the Feoffor; and adjudged, that this Remainder was to the heirs of the Feoffor a parte materna, according to the ancient Estate and Use which the Feoffor had before the Feoffment: And the Reason was, because this Remainder of the Use did arise out of the Estates which immediately moved from the Feoffor, and was no more than what the Law would have reserved, if no Use at all had been declared of the Remainder. But in the present Case, the Use limited in Remainder to the right heirs of J. S. does not arise out of an Estate that moved immediately by that Conveyance from J. S. but out of the Estate of the Conusees, who were seised in Fee both of the Estate and Use by the Fine, and did by the Common Recovery convey over that Estate, out of which all the new Uses and the Remainder in Question arose. To this the Chief Justice said, That the Fine and Common Recovery were both to be taken as one intire Conveyance, consisting of these several Parts, and directed as to the Use of them by the same Covenants. That tho' the Conusees had a Seisin in Fee of the Estate and Use vested in them by the Fine for a special Purpose, and upon that Seisin the Common Recovery was had, and in Stridness the Estate passed by it was her Estate; yet upon Consideration of the whole Conveyance the Estate did originally move from J. S. who was the Conusor of the Fine; and for that Reason, if there had been no Limitation at all of this Remainder of the Use upon this Recovery, he took it to be very clear, that so much as remained unlimited should result to the Conusor and his heirs, and not to the Conusee in whom the Estate was not vested with a Purpose to create him any Interest, but in Order to forward and compleat the Conveyance of the Conusor's Estate, which was taken as one Conveyance; then does the Use limited upon the Common Recovery, as properly arise out of the Estate that moved from the Conusor of the Fine, as if he had made a Feoffment or Fine, or any single Conveyance to that Use. Judgment for the Plaintiff.

Vide ante 567, 570.

Note; Estates-Tail can't be barr'd where the Reversion is in the Crown. Raym. 358.

REVOCATION.

See 1 Lev. 86.
 2 Lev. 149.
 Cro. Jac. 497.
 3 Lev. 213.
 1 Show. 89.
 (1.)
 Special Ver-
 dict finding
 a Will of
 Lands, and
 that after-
 wards the
 Testator
 made aliud
 Testament.
 imports not a
 Revocation.
 1 Co. 112,
 & 174.
 10 Co. 86.
 2 Lev. 149.
 S. C. 2 D.
 528. p. 7.
 3 Mod. 203.
 1 Show. 537.
 Comb. 90,
 209.

Hitchins *versus* Bassett. Trin. 5 W. & M. B. R.

IN Ejectment, the Jury found a Special Verdict: That Sir H. Killigrew being seised in Fee, made his Will, and devised his Lands to B. for Life, Remainder in C. in Fee; they find likewise that Sir H. Killigrew made aliud Testamentum in Writing; but what were the Contents of that Will they don't know: The Question was, if the first Will was revoked? Fines argued, That every later Will is not a Revocation, for a Man by one Will may dispose of one Acre, and by another Will of another Acre: So if a Man purchase Lands after he has made his Will, he need not make his Will over again, but make another Will as to these: Vide Cro. Car. 293. Therefore this other Will might be of other Lands, and no Revocation, and the aliud Testamentum might be no Revocation, but might be consistent. Cro. Eliz. 721. Cro. Car. 24. Levinz contra argued, That Revocations are favoured, because they are in the Nature of Restitution to the Heir, and all Restitutions are favoured. Vide Dyer 310. Moor 429. 1 Roll. 614. A Deed of Feoffment without Livery, a Bargain and Sale without Inrolment, a Grant of a Reversion without Attoznmment will revoke a Will, and yet they are void Acts; but the Reason is, That it appears now it was not the Testator's Intent that it should remain his Will, the first Will must be supposed to be perfect and include all; and if a Man claims by devise, he must in Pleading say, that the Testator by his last Will devised, &c. 44 Aff. 36. 2 Ric. 2. 3. b. But the Court were of Opinion, That it was no Revocation, and the aliud Testamentum might concern other Lands, or no Lands at all, or be a Confirmation of the former: And the Judgment was afterwards affirmed in the House of Lords. Vide Hard. 374. Parl. Cases 144.

Lugg *versus* Lugg. Mich. 8 Will. III. B. R.

(2.)
 Will of per-
 sonal Estate
 presumed to
 be revoked
 by Alteration
 of Circum-
 stances.
 Vide 1 Salk.
 257.
 S. C. Cases
 B. R. 236.

BEFORE a Commission of Delegates. One being single made his Will, and devised all his personal Estate to J. afterwards he married and had several Children, and died without other Will or Disposition, and now coram Delegatis, of what Tre

Riots, Routs, and unlawful Assemblies. 593

Treby C. J. was one, 'twas ruled, That there being such an Alteration in his Estate, and Circumstances so different at the Time of his Death from what they were when he made the Will, here was Room and presumptive Evidence to believe a Revocation, and that the Testator continued not of the same Mind.

For Revocation of Uses, &c. Vide 1 Co. 112, 173, 174. 6 Co. 33, 10 Co. 86, 143. Cro. Car. 472. Chan. Cas. 242. 2 Lev. 149.

Riots, Routs, and unlawful Assemblies.

See the Stat.
13 H. 4. c. 7.
2 H. 5. c. 8.
19 H. 7. c. 13.
& Stat. 1 Geo.
c. 5.
2 Rol. Abr.
82.

Dominus Rex versus Ingram & al'. Hill. 8 Will. III. B. R.

INGRAM and many others were convicted of a Riot on 13 H. 4. c. 7. before two Justices of Peace, together with the Sheriff. Et per Cur', 1st, If the Rioters be convicted upon View, the Sheriff must be Party to the Inquisition; but if the Rioters disperse before Conviction upon View, the Sheriff need not be Party, for the Justices may make the Inquisition without the Sheriff. 2dly, Such Inquisition by two Justices is *pro Domino Rege*, and need not be alledg'd *capt. pro Domino Rege* *corpore Comitatus*, as an Inquisition by a Grand Jury, who inquire as well *pro corpore Comitatus*, as *pro Domino Rege*. 3dly, If the Justices make not Inquiry within a Month after the Riot, they are punishable; yet they may inquire after the Month, the Lapse of a Month does not determine their Authority, but only subjects them to a Penalty.

(1.)
To Inquisition of Riot upon View, Sheriff must be Party, otherwise not, and such Inquisition is *pro Rege* only.
See 6 Mod. 141.
1 Sid. 186.
1 Keb. 695.
Raym. 386.
Carth. 383.
S. C.
Comb. 413.
Dyer 210.

Dominus Rex versus Heaps. Pasch. 11 Will. III. B. R.

INDICTMENT, That the Defendants riotose & routose & illicite assemblaverunt, & sic assemblati existentes riotose & routose insultum fecerunt in quendam J. Russel, &c. Upon Not Guilty, the Jury found two Defendants guilty, and acquitted the rest: And it was moved in Arrest of Judgment, that two cannot make

(2.)
Indictment for a Riot and Assault.
Acquittal of the Riot is so of the Assault.
Vide 1 Salk. 384, 385.
2 Show. 93, 149.

594 Riots, Routs, and unlawful Assemblies.

Vide Post
642. Pl. 14.
2 Show. 93,
&c.

make a Riot, and therefore cannot be guilty of a Riot, and the
all are acquitted by this Verdict: On the other Side it was said
That the Assault and Battery is charged in the Indictment as
well as the Riot; and two Defendants may, as they are found
be guilty of that.

Vide 3 Mod.
141.
Hawkins's P.
C. 155.

Sed per Holt C. J. A Riot is a specifick Offence, and the Bat-
tery is not laid as a Charge of itself, but as a Part of the
Riot; for the Riotose & Routose runs thro' all, and is ascribed
to the Battery as well as the Assembly. The Consequence is
That these Defendants being discharged of the Riot, are dischar-
ged likewise of the Battery; and no Judgment can be given
and Judgment was arrested.

Domina Regina *versus* Soley & al'. Trin. 6 Ann. B.

(3.)
Unlawful As-
sembly ne-
cessary to a
Riot.
Vide Hawk.
P.C. 155, &c.
Pop. 121.
2 And. 67.
Moor 656.
S. C. Holt
353.
Rep. A. Q.
100, 115.

INFORMATION that the Defendants tiel jour & lieu Bal-
lum & Burgenses de Bewdley in Guihalda Burgi præd. assem-
blat' ad eligend. ballivum burgi prædict. pro Anno tunc prox'
quent. deservitur' in electione prædict. procedere vi & armis clam-
oribus & vociferationibus illicite riotose & routose impediverunt.
The Defendants were found guilty, and upon Motion in Arrest
Judgment it was held naught. 1st, Because it did not appear
that any Right is claimed, nor any such Franchise pretended
so that they might be doing an unlawful Act; but if they had
shewed a Right to this Franchise, this might be a Disturbance
them in the Use of it; and to disturb another in the Use of a
just Franchise, is an unlawful Act. Vide 29 E. 3. 18. The
Trespas. Vide Reg. 94. Asht. 434. Rast. 662. 2dly, Because it
not said that the Defendants unlawfully assembled; for a Riot
a compound Offence. There must be not only an unlawful Act
be done, but an unlawful Assembly of more than two Persons.

Disturbing
H. in the
Use of his
Franchise is
a Trespas.

Domina Regina *versus* Soley & al'. Trin. 6 Ann. B.

(4.)
Unlawful
Act to be
done neces-
sary to a
Riot.
Vide 3 Inst.
176.
Hawk. P. C.
157.
S. C. Holt
353.
Rep. A. Q.
100, 115.

INFORMATION that the Defendants illicite riotose & r-
tose assemblaverunt ad pacem perturband. & vi & armis offi-
cujusdam Domus vocat. the Guild-hall Burgi de Bewdley, clausu-
existen. de cardinibus riotose & routose elevaverunt. The Def-
dants were convicted, and upon Motion in Arrest of Judgment
was held naught, because it did not appear whose House it was
If it was the Defendants it was not an unlawful Act. Every
Crime must arise from an unlawful Act. It is said to be void
the Guild-hall Burgi, but calling it so does not make it so: The
Guild-hall may belong to a private Person as well as the Town-
rough. Vide Dy. 68. Yel. 28. 3 Cro. 200. Yet the Chief Justice
thou

thought an Assembly might meet together with such Circumstances of Terror as to be a Riot: He called it a Kind of Assault upon the People. Vide Hob. 91. 1 Mod. 73. West. Preced. 149. Lamb. 5 Co. 91. b. 108. 3 Keb. 623. 1 Ro. Rep. 49.

Domina Regina *versus* Ellis. 6 Ann. *At Nisi Prius* in Middlesex, *coram* Holt C. 7.

INDICTMENT against four Defendants, for that they did riotously assemble, and Vi & Armis beat and wound one Ellis. Upon Non cul. it appeared at the Trial, that Ellis who was the Enfield Stage-Coachman driving to London in the Highway, and Defendants, one in a Chaise, and the rest on Horse-back, over-took him, and that the Chaise was over-turned by the Coach, but not through any Fault of the Coachman; but that the Driver of the Chaise and his Company taking Offence at it, followed the Coachman and beat him barbarously. It was objected upon this Evidence, that this was a Trespass, but not a Riot, because the Company was lawfully assembled. Et per Holt C. J. If several are assembled lawfully without any evil Intent, and an Affray happens, none are guilty but such as Act; but if the Assembly was originally unlawful, the Act of one is imputable to all. And, If three, or more, are lawfully assembled, and quarrelling, and fall upon one of their own Company, this is no Riot; but if be on a Stranger, the very Moment the Quarrel begins, they begin to be an unlawful Assembly, and their Concurrence is Evidence of an evil Intention in them that concur; so that it is a Riot in them that act, and in no more. So ruled, and so found the Jury.

(5.)
If three, or more, assemble lawfully, and quarrelling, fall upon one of their own Company, 'tis no Riot; if on a Stranger it is, but in those only who concur. See 1 Mod. 13. cont. 2 Keb. 558. 6 Mod. 43, 141, acc. S. C. Holt 636.

Vide Tit.
Motion.

Rules of Court.

Sir James Butler's Case. Mich. 8 Will. III. B. R.

(1.)
Defeating a
Rule of Court
by a Stran-
ger, is a Con-
tempt.

UPON a Rule of Reference to Arbitrators, they make an Award for the Plaintiff, and a Stranger by Contumace defeats the Party of the Benefit of this Award Per Cur'. It is a Contempt to the Court, and an Attachment shall be granted; for it shall not be in any one's Power to defeat the Rules of this Court, or render them ineffectual.

Anonymus. Mich. 8 Will. III. B. R.

(2.)
Construed
largely.

IF a Man enters into a Rule in B. R. not to sue Execution upon a Judgment, and brings an Action of Debt upon the Judgment, 'tis a Breach of the Rule. Per Cur'.

Gregg's Case. Pasch. 5 Ann. B. R.

(3.)
Where an
Administra-
tor sues, can-
not bring
Money into
Court.
See 6 Mod.
11, 25, 101,
155.
Ante 593.
H. 2 Ann. C.
B.
Money may
be brought
into Court;
In Covenant
for Rent,
Debt for
Rent,
Replevin
and Avowry
for Rent.
S. C. ante 89,
593.
Mod. Cases
29.
1 Salk. 130.
Holt 472.

PER Holt C. J. at the Sittings at Guild-hall, in an Action by an Administrator: The Defendant cannot bring Money into Court, because the Administrator is not by Law to pay Costs and Pasch. 5 Ann. B. R. in Gregg's Case, an Action was brought by an Executor for Money due to his Testator for Law-busines done by him, 'twas moved to bring so much Money into Court but denied.

Covenant and Breach for Non-payment of Rent, and for repairing, &c. 'twas moved to bring in so much for the Rent and as to the other Breach, that the Plaintiff might proceed as thought fit. Et per Trevor, All the Judges have agreed, (for put the Case to Holt C. J.) that it is but reasonable to allow it: That it does not differ from Debt for Rent; for tho' it is a Covenant, yet it is a Covenant for Payment of a Sum certain. The same Diversity was taken between Covenant for a Sum certain and Chose incertain, per Holt C. J. Hill. 9 Will. 3. B. R. saying it did not differ from an Indebitatus Assumpsit. Et Trevor 12 W. 3. B. R. same Rule.

In a Quantum meruit bringing Money into Court was denied. ^{Quantum meruit.} Hill. 8 Will. III. B. R. But Pasch. 5 Ann. B. R. it was allowed, ex motione Magistri Raymond.

In Trover for a Horse, Bridle and Saddle, 'twas moved to bring the Saddle and Bridle into Court; but denied Trin. 2 Ann. B. R. Wilcocks the Attorney's Case.

Replevin, Defendant avows for Rent, and Plaintiff admitted to bring it into Court. Hill. 10 W. 3. B. R.

In Ejectment upon an Entry for Non-payment of Rent, the Court staid all Proceedings upon bringing all the Rent into Court, and accepting a new Lease and sealing a Counterpart. Downes versus Turner, Mich. 8 Will. III. B. R.

In Debt for Rent, 'twas moved to bring so much into Court, and Holt C. J. thought it hard; he said he remembered the Beginning of these Motions; the first was to bring in Principal and Interest upon a Bond; after that it came to an Indebitat. Assumpsit: It has been done in Debt for Rent, but not so freely; we do it in Ejectment on a special Reason, viz. because that Action subsists intirely upon the Rules of the Court. Per Holt C. J. Pasch. 10 W. 3. B. R.

In Debt upon a Bond; Defendant must bring in the whole Penalty, or the Court will not stay Proceedings. Hill. 9 W. 3. B. R. But semble ne poet estre without bringing in the whole Money. If the Parties dispute the Quantum, and there is a Dispute how much is due, ne poet estre referre. Trin. 11 W. 3. B. R.

Elliot versus Callow. Mich. 9 Ann. B. R.

DEFENDANT brought Money, viz. 10 l. into Court, and had it struck out of the Declaration: Afterwards the Plaintiff suffered a Nonsuit; and the Question was, Whether he should be allowed to take this Money? Et per Cur', he shall; for so much the Defendant has admitted to be due, and so much he has actually paid him; and if the Cause had gone on to Trial, there must have been a Verdict for the Plaintiff as to so much; for this is admitted to be due, and paid down as the Plaintiff's Money; otherwise perhaps of Money paid into Court by Way of Tender. If a Man pleads a Tender & uncore Prist, and pays the Money into Court, and the Plaintiff takes Issue on the Tender, and it is found against him, the Defendant shall have the Money. Sty. 388.

(4.)
Tho' Plaintiff is nonsuit, yet he shall have Money brought in upon striking it out of the Declaration.

SCIRE FACIAS.

Panton *versus* Hall. Trin. 1 W. & M. B. R. Rot. 130

(1.)
Judgment a-
gainst two;
Scire facias
against one,
ill.

Vide post
601.

Farell. 3, 4, 6.
S. C. Carth.
105.

Vid. Co. Ent.
621. a.

1 Rol. Abr.
888.

Allen 21.
S. C. 3 D.

334. p. 6.

Return of
Sci. feci a-
gainst Ter-
tenants ought
to be of all the

A Judgment in Debt was recovered against A. and B. and a Scire facias awarded against the Certenants and the Heir of B. The Sheriff returned a Scire feci as to the Heir, and returned several Persons Certenants in balliva sua, warned; they appear and plead in Abatement, no Scire

facias had been awarded against A. The Plaintiff replied, That he at such a Time sued out a Scire facias against A. and set forth. This Replication was held naught on Demurrer, for

Scire facias is a judicial Writ, and must pursue the Nature of the Judgment; therefore as the Judgment is joint, so ought the Scire facias; whereas here they are as several independent Suits. 2 Ro. 276. 20 H. 7. 3. Cro. Car. 517.

2dly, The Return is ill, for it should not be, that A. B. and C. are Tenants of Lands in balliva sua, but A. B. and C. are Tenants of all the Lands in balliva sua.

to be of all the Tertenants in balliva sua. Herne 326. 2 Brownl. 392.

Tully's Case. Hill. 6 Will. III. B. R.

(2.)
Error to re-
verse a Fine.
3 Mod. 274.
1 Salk. 339.

IN Error to reverse a Fine, tho' in Strianness of Law a Scire feci being returned against the Conusees, is sufficient; for fear of Purchasers, and in Favour of them, there shall be Scire facias against the Certenants.

Hardisty *versus* Barny. Hill. 7 Will. III. B. R.

(3.)
Where Scire
facias shall
issue on Mo-
tion, and
where with-
out.
S. C. Comb.
356.

IF a Judgment be above ten Years standing, the Plaintiff cannot sue a Scire facias without Motion in Court; if under ten, he cannot have a Scire facias without a Motion Side-Bar. Note; if after such Motion and Judgment revived by Scire facias, the Defendant dies before Execution, the Plaintiff must sue a new Scire facias, but may have it without Motion for the Judgment was revived before. Per Cur'.

Anonymus. Trin. 8 Will. III. B. R.

IN C. B. there is but one Scire facias, and upon Nihil returned Execution. In the King's Bench there are two Scire facias's and two Nihils returned, and heretofore both were sued out together by making the Teste of the Second as if the First were returned; but now the Court made a Rule that both should not be sued out together, but the First should be duly returned before the Second should be sued out, and that the Second should be tested the Day of the Return of the First.

(4.)
Rule for suing out and returning Scire facias. Fares. 5, 6, 40, 56, 68, 69, 138. 6 Mod. 86. & infra Pl. 7. & 12. Cumberb. 452, 428.

Lugg *versus* Goodwin. Mich. 10 Will. III. B. R.

A Scire facias upon a Judgment against the principal Defendant was, in hac parte. Et per Holt C. J. on Search of Precedents; where it is against the Defendant himself, it should be in hac parte; Where against the Bail, in ea parte, and this will reconcile the Precedents.

(5.)
Against Principal in hac parte, and Bail in ea parte. Fares. 4. S. C. Cases B. R. 214.

Anonymus. Trin. 11 Will. III. B. R.

A Capias ad satisfaciendum against the Principal in order to charge the Bail must lie four Days exclusive in the Sheriff's Office, but there is no set Time for a Scire facias: Same Rule laid down Mich. 10 W. 3. B. R. But a Scire facias against Bail must lie a convenient Time, and the first Scire facias may be antedated even in Term-time, per Clarke Secondary. Sed per Holt C. J. It cannot be antedated where it issues by Rule of Court.

(6.)
Scire facias against Bail must lie in the Sheriff's Hands a convenient Time.

Goodwin *versus* Peek. Mich. 11 Will. III. B. R.

THE first Scire facias was tested the 24th Day of October, and returnable the 31st Day of October; the Alias was tested the same Day, returnable the 7th Day of November. Now objected, there ought to be fifteen Days exclusive between the Teste of the first and Return of the last: But the Court held, that here being fifteen Days inclusive, 'twas very well, and the Justifiers agreed it. Vide 2 Jones 228.

(7.)
Fifteen Days inclusive between Teste of first and Return of last, sufficient. Vide Post 602. 1 Lutw. 26. Mod. Cases 146. S. C. Carth. 468. Cases B. R. 215. Holt 759.

Proctor

Vide 3 Lev.
100.

Lutw. 1268.

(8.)
Scire facias
lies on a
Judgment in
Ejectment.

Proctor *versus* Johnson. Pasch. 13 Will. III. B. R.

ON a Judgment in Ejectment in C. B. a Scire facias was brought against the casual Ejector, suggesting, that since the Judgment A. and B. ingressi sunt & modo tenent. And on the murther, Judgment given quod haberet Execution, and upon the Award of Execution a Writ of Error was brought in B. R. where the Objection was, That a Scire facias lay not on a Judgment in Ejectment; for at Common Law it lay only in real Actions; and the Statute gives it only in personal. Vide 2 Inst. 469. Et per Holt C. J. 1st, At Common Law there was a Scire facias on a Judgment in real and mix'd Actions: It lay on a Judgment in Ejectment for the Land was bound by the Recovery, which was a good Title, and there was no other Way to execute the Judgment upon Change of Parties, as there was in Case of Judgment for Debt and Damages, where Debt lay on the Judgment.

Writ general.

2dly, The Scire facias may either be general against all Certe- nants, or against the Certenants, naming them.

3dly, That Strangers may falsify, but those that claim under the Judgment are estopped and bound by the Judgment.

S. C. Ante
258.

3 D. 331.

p. 11. 332.

p. 6.

Far. 50, 64.

3 Salk. 319.

Holt 77, 265.

(9.)

Whether Sci-
re facias lay
in personal
Actions be-
fore West. 2.

Withers *versus* Harris. Mich. 1 Ann. B. R. (Vide the Case, Title Ejectment, pl. 11.)

IF was said by Holt C. J. I am not satisfied with the Opinion of my Lord Coke on West. 2. that at Common Law no Scire facias lay on a Judgment in a personal Action, till West. 2. the Words *sive alia quaecunq; irrotulata came after contractus* and conventiones, and therefore cannot be construed of Judgments but the Law has been otherwise taken, and I must submit; I plain it lay on a Judgment in Annuity.

S. C. ante 564.
Post 659.

6 Mod. 132,

42.

3 D. 314 p. 6.

Holt 612.

(10.)

Scire facias
against Bail
in B. R. must
be brought
in Middle-
sex, and not
elsewhere.

Lutw. 1286.

3 Lev. 235,

245.

Cro. Jac. 331.

Hob. 195.

Aleyn 12.

1 Cro. 312.

Shuttle *versus* Wood. Mich. 2 Ann. B. R.

ON a Recognizance taken in B. R. the Scire facias must be brought in Middlesex; for the Recognizances there are obligatory by the Caption, but by their being entered of Record in the Court; so 'tis of Debt: But on a Recognizance in C. B. the Scire facias may be laid in the County where the Caption was or in Middlesex where 'tis filed; for 'tis a Record by the Caption and becomes immediately obligatory, and therefore may be brought there; and 'tis also filed at Westminster in C. B. and there remains of Record. Vide Al. 12. 1 Cro. 312. Hob. 195.

Adams and Tertenants of Savage. Mich. 3 Ann. B. R.

AN Administrator brought a Scire facias on a Judgment recovered by his Intestate against H. and the Writ was general against such as were Tenants of the Land of H. at the Time of the Judgment. The Sheriff returned several Tertenants warned; among the rest one A. seised of a Messuage and of a Manor called D. The Tenants appear, and all join in this Plea, viz. That S. is seised of the Freehold of the Manor of D. & petunt judgment de brevi, & quoad breve ill. cassetur. Et per Curiam, The Plea was held ill; and resolved,

1st, That the Tertenants cannot join in this Plea, because they are severally returned, one for one Part, and another for another.

2dly, This is pleading a Non-tenure by Implication as to the Manor of D. Now in a Scire facias on a Judgment in Debt, or any personal Action, the Defendant cannot plead Non-tenure generally, because 'tis contrary to the Return of the Sheriff, but he may plead a special Non-tenure in such Case; and so the Law is now after long and great Difficulty settled. 3 Cro. 872. E. 4. 19. 9 H. 5. 11. But in a Scire facias for Execution in a real Action, the Defendants may plead a general Non-tenure; because their Freehold, which is much favoured in Law, is in question.

3dly, The Tertenants in this Case may plead there be other Tertenants not named in the same County, and pray Judgment they ought to answer, quousque the others be summoned, but ought not to pray, quod breve cassetur; for the Court ought never to abate the Writ, but where the Plaintiff can have a better Writ; otherwise if the Writ had been particular in naming the Tenants. Vide 2 Saund. Jeffreyson versus Dawson, a good precedent: And they seemed to doubt whether the Tertenants could plead other Tertenants not warned in another County; and the Chief Justice cited Owen 104. that Tenant for Years may be a good Tenant to plead in Bar to a Scire facias to a personal Action where Damages are recovered, but not in a real Action. Vide Co. Ent. 702. 624. 2 Cro. 506. Cro. El. 740. Saund. 8. Palm. 241. 1 Ro. Rep. 53.

S. C. 1 Salk. 40.
& Post 679.
6 Mod. 134,
199, 226.
3 Salk. 321.
Holt 179.

Lilly Ent. 398.
(11.)

Tertenants
return'd for
several Parts
cannot join
in a Plea,
which goes
to one Part
only.

See before
598. Pl. 1.
2 Saund. 23.
Farell. 15.
6 Mod. 134,
199.

Where Non-
tenure may
be pleaded
generally or
specially.

Vide ante
569.
3 Keb. 25, 50.
3 Lev. 205.
6 Mod. 226.
1 Keb. 55,
310, 351, 352.
2 Keb. 587,
636.

2 Saund. 23.
1 Mod. 29.
1 Sid. 436.
2 Keb. 529,
&c.

Ball *versus* Manucaptors of Russel. Trin. 4 Ann. B. R.

(12.)
Scire facias
on Recogni-
zance of Bail
assigning
Breach, that
the Defen-
dant did not
pay nor ren-
der Prisonæ
Mar. Ma-
resc. nostræ,
sufficient.
Vide Lutw.
1273.

SCIRE FACIAS against Bail, setting forth, quod cum qurens recuperasset against one Russel, and the Defendants venerunt plegii, that he should either pay vel se reddere prisonæ Maresc. Mareschal. nostræ. The Defendant prayed Oyer of the Recognizance; and that was, That he should pay, vel se reddere prisonæ Mareschalli Mareschalsiæ Dominæ Reginæ coram ipsa Regina, quo lecto & audit. the Defendant pleaded, that there was Capias ad satisfaciend. returned against the Principal; the Plaintiff replied, there was a Capias ad satisfaciend. and set it out; the Defendant demurred. It was objected by Pengelly, That the Oyer given was defective, not shewing of what Term the Recognizance was, so that it did not appear to warrant the Scire facias; or that it is what the Scire facias is brought upon: That the Capias set forth appears to have but four Days between the Term and Return, and that there is no Breach assigned by the Scire facias, for the Render by the Recognizance ought to be to the Marshal of the King's Bench Prison; but the Breach is, That he did not render himself Prisonæ Mareschalli Mareschalsiæ nostræ, which is the Prison of the Palace. Vide 10 Co. 68. b. Thel. Br. 2. N. Br. 251. J. 5 E. 3. c. 8. and Spelm. Gloss. in hoc verbo. To this it was answered and resolved by the Court,

1st, That tho' the Oyer be imperfect, yet there is no Variance between the Scire facias and Recognizance, and since they agree together, the Recognizance is a sufficient Ground for the Scire facias; but the Defendant should not have gone on, but insisted upon his Want of Oyer.

Eight Days
must be be-
tween the
Teste and Re-
turn of Capi-
as ad satisfac.
against the
Principal in
order to
charge the
Bail.

Vide ante
599. Pl. 7.
Farell. 40,
96, 138.
1 Lutw. 26.
Q. 6 Mod. 86.
Mod. Cases
146.

2dly, There ought to be eight Days between the Teste and Return of the Capias ad satisfaciendum against the Principal, the Practice and Course of the Court; and if the Defendants moved for the Irregularity, the Court would have helped them. But in Point of Law, the Process of this Court may be returnable de die in diem, especially into Middlesex; and therefore they shall not take Advantage of this which is but an Irregularity, upon Demurrer.

3dly, All other Marshalleas were derived from the Earl Marshal of England, and the Marshal of the Household is never styled Mareschallus Mareschalsiæ nostræ; and this being a Scire facias on a Recognizance of Bail taken here, the Marshal here must intend the Marshal of this Court. Judicium pro quer.

Attwood *versus* Burr. Pasch. 5 Ann. B. R.

A Writ of Error was brought upon the Award of Execution on a Scire facias against Bail, and thereupon the Record of the Judgment against the Principal was also returned: It was assigned for Error, that the Scire facias was sued out and prosecuted by J. S. his Attorney, but no Warrant of Attorney entered of Record. It was answered, That J. S. appears to have been the Attorney in the principal Cause, and in that to have had a Warrant, but the Court reversed the Judgment; for the Record against the Principal need not have been certified upon this Writ of Error, and the Suit against the Principal was another distinct Suit; therefore there ought to be a particular Warrant of Attorney for this Scire facias against the Bail, and this Warrant ought to be entered, not before the Writ sued; for any Body may sue out the Scire facias; but upon the Return thereof, for then the Suit commences.

S. C. ante
89, 402.
Farell. 3.
Carth. 447.
3 Salk. 369.
Lilly Ent.
225, 403.
(13.)
Judgment on
a Scire facias
against Bail,
reversed for
want of War-
rant of At-
torney.
5 Mod. 397.
called Att-
wood *versus*
Duell.
1 Salk. 89,
402.
6 Mod. 304.
Comberb.
149, 161.

Anonymus. Pasch. 5 Ann. B. R.

IN the Case of the King there need not be any Scire facias after the Plea.

Vide Co. Lit.
70, 83, and
107.
3 Lev. 21.
4 Co. 8, 9, &c.

Service and Suit.

Tomkins *versus* Crocker. Pasch. 2 Ann. B. R.

Service by
doing Suit to
the Court of
a Manor
twice a Year.
Carth. 520.
Same Names.
Cases B. R.
369.
Holt 452.
2 Lutw. 1211.
N. L. 380.
Lex Man.
Ap. 67.

IN Replevin, the Defendant made Conuſance for Fealty, Rent, and Suit of Court, and the Suit of Court was laid to be Suit to the Court of a Manor twice a Year: The Plaintiff confeſſing a Tenure by Fealty and Rent, traversed the Tenure by Fealty and Rent and Suit to the Court of the Manor twice a Year. The Jury found there was but one Freeholder Tenant of the Manor, and that Time out of Mind an ancient Court had been held before the Steward, and that ſeveral Freeholders, Tenants, did Suit to it, and that the Plaintiff held by the Service of doing Suit ad Cur. Man. præd. bis in anno apud Curiam Manerii. Mr. Raymond objected, That the Court found by the Jury, is not the Court claimed by the Conuſance; for Curia Manerii is the Court-Baron, which is incident of common Right, and therefore no Title need be made for it, nay it cannot be preſcribed for; whereas this Court here found is a ſpecial cuſtomary Court, for which he ought to make Title in his Conuſance, and not a Curia Manerii. Vide 1 Inſt. 58. 2 Inſt. 99. 1 Inſt. 20 Noy 20. Et per Holt C. J. and Powel J. As a Court of Pie-powders may be to hold Plea of Things out of the Market, and yet is a Court of Pie-powders; ſo may a Court of a Manor more than a Court for Suits every three Weeks, and yet be a Court of a Manor: There may be a Manor Court to be held before the Steward bis in anno. Vide 1 Leon. 316. And it is to inquire of Arrearages of Rents and Services: And the Suit to ſuch Court ſhall be intended by Reſervation before the Statute of Quia emptores terræ. Vide 12 H. 7. 18. One that is reſervant may be bound to do Suit real; for it ſhall be intended Suit-Service reſerved on creating the Tenure: And the Court held in the principal Caſe, That the Suit ſet forth in the Conuſance was expreſſly found by the ſpecial Verdict.

Sessions General and Quarter.

Vide ante
470, 474.
475, 476,
477, 479,
480, 482,
490, 491,
494.
5 Mod. 319.
2 Hawk. P.
C. cap. 8.

The *Case of the Parish of King-Langley.* Trin.
11 Will. III. B. R.

A Motion was made to quash an Order of Sessions, because the Justices had adjourned the Appeal from one Sessions to another, and so the Determination upon the Appeal was not at the next Quarter-Sessions: Sed non allocatur: For the Appeal must be lodged at the next Quarter-Sessions; yet when it is lodged, the Justices may adjourn it.

(1.)
Appeal may be adjourn'd from one Quarter-Sessions to another.
Vide ante
494.
Post 606, 608.
S. C. Cases
B. R. 260.
Set. and Rem.
120, 114.

Inter The Parishes of Lingfield and Battle. Pasch.
1 Ann. B. R.

CAPTION of an Indictment of Sessions was, Sessio Tent. vicesimo & vicesimo octavo die Julii, &c. Et per Holt C. J. it is naught, for tho' a Sessions may adjourn from one Day to another, and so sit by Adjournment, yet it must not appear in a dump, as sitting three Days together, but distinctly.

(2.)
Sessions cannot be entered as sitting three Days together.
Ante 494.
Post 606, 608.
S. C. Sett. and Rem.
143.

Domina Regina versus Savin. Pasch. 2 Ann. B. R.

AN Order of Sessions was made, that the Clerk of the Peace should prosecute an Indictment of Barretery found against J. S. and that the Charge be allowed out of the County-stock. Note; By 43 Eliz. c. 2. The Justices have Power to dispose of the Surplus to charitable Uses; Upon which Clause it was offered to maintain this Order: But the Court said this was not to take Place out of the Surplus, but out of the original stock; besides, a Gift of Lands to raise Money to prosecute offenders, would not be good as a charitable Use.

(3.)
Sessions cannot make an Order to prosecute an Offender out of the County-stock.

Anonymus. Mich. 2 Ann. B. R.

(4) **W**HEN a Statute gives a Penalty to be recovered before Justices of Peace, and prescribes no Method, it ought to be by Bill. Per Holt C. J.

Inter The Inhabitants of St. Andrew's Holborn and St. Clement Danes. Mich. 3 Ann. B. R.

(5.)
Sessions may
alter and set
aside their
own Orders
the same Ses-
sions.
Ante 494,
605.
Post 608.
5 Mod. 396,
417.
S. C. 6 Mod.
287.

UPON a Certiorari the following Orders were removed in to B. R. 1st, An Order made at the General Quarter Sessions of Middlesex, 1704. which recited an Appeal made at the General Sessions of the Peace for the same County in September 1704. by the Parish of St. Clement Danes, against an Order of two Justices, to remove one Mary Gear from St. Andrew's Holborn to St. Clement Danes, as the Place of her last legal Settlement; and that it was thereupon ordered, That the said Appeal should be determined such a Day this Sessions, and that the Churchwardens, &c. of St. Andrew's Holborn should then attend, and then went on and ordered, That forasmuch as it appeared to the Court upon Oath, That a Copy of the said recited Order was served upon the Churchwardens, &c. of St. Andrew's Holborn; and for that the Churchwardens, &c. of St. Andrew's Holborn had neglected to attend, the Court allowed the Appeal. 2dly, An Order which recited, That whereas the Churchwardens, &c. of St. Andrew's Holborn, had then paid an open Court to the Churchwardens of St. Clement Danes 40s. Costs allowed to them, because the Churchwardens of St. Andrew's Holborn neglected to attend, upon which the Appeal was allowed, and the Order of the two Justices vacated; and then ordered, That for good Reasons shewn unto this Court, It be ordered, that the said recited Order of this Court made on Monday last, be vacated and discharged, and that the said Appeal be reheard. 3dly, An Order setting forth, That upon hearing the Appeal of St. Clement Danes, it not appearing that Mary Gear hath any legal Settlement in St. Andrew's Holborn, or elsewhere save in St. Clement Danes; this Court doth dismiss the said Appeal, confirm the Order of the two Justices, and order the said Mary Gear to be continued in St. Clement Danes. Mr. Darn moved to quash the second and third Orders; he argued, That the Hands of the Court were tied up by the first Order of Sessions; sed tota curia contra; and Holt C. J. That during the Sessions, the Order was in the Breast of the Court; and tho' it was drawn up, yet it was so far in the Breast and Power

of the Court, that by the second Order it ceased to be a Record. The Court at the Old Baily have altered and set aside their Judgments ten Times the same Sessions; where Judgment de pain fort & dure has been given, the Court have after let him in to plead, and after upon his Trial he has been convicted, and has had another Judgment against him to be hanged: So it is of Judgments here; which during the same Term are in the Breast of the Judges; but then he said, they ought to set the first Order wholly aside, and have entered up the third Order as the only Order; for the Effect of the Court's setting aside of the first Order is, That it ceases to be an Order, and consequently ought not to be returned to us as an Order vacated by another Order, but it should have been annulled and made nothing; As in this Court we cannot enter up one Judgment upon Record, and then enter a Vacat of that, and then enter a contrary one: The Sessions as well as the Term is but one Day in Law. But the Matter was referred to the three puisne Judges; & sic quievit.

The Case of Foxham Tithing *in Com.* Wilts. Hill.
3 Ann. B. R.

A Justice of Peace was Surveyor of the Highway, and a Matter which concerned his Office coming in question at the Sessions, he joined in making the Order, and his Name was put in the Caption. Et per Holt C. J. It ought not to be; as if an Action be brought by the Chief Justice of the Common Pleas in the Court of Common Pleas, the Placita must be coram Ed'ro Nevill Mil. & Sociis suis, and not coram Thoma Trevor, &c. And it was quashed.

(6.)
Order of Sessions quashed, because it concerned one of the Justices named in the Stile of Court.
S. C. Sett. and Rem. 171.
Holt 517.

Inter The Inhabitants of the Parishes of South Cadbury and Braddon *in Com.* Somerset. Mich. 9 Ann. B. R.

ON an Appeal to the Sessions the Court discharged the first Order, and now Mr. Earl moved to set aside the Order of Discharge, because the Justices do not say whether they discharge it for Form, or on the Merits; for if it was for Form, the Parish is not bound; but if on the Merits, the Parish in consequence is thereby discharged for ever. Et per Cur', 1st, The Justices are not bound to express the Reason of their Judgment in the Judgment, no more than other Courts; and if it was otherwise held in the late Chief Justice's Time, it past without due Consideration. The Reason of their Judgment must be collected from the Record; as where Judgment is arrested upon an insufficient Indictment.

(7.)
The Sessions need not set forth the Reason of their Judgment.
S. C. Sett. and Rem. 172.

Orders re-
vers'd, ante
442, 486,
492, 494,
6 Mod. 287.

If the Sessions reverse the first Order, and that being removed appears to be good, this Court must intend it was reversed on the Merits, and affirm the Order of Sessions.

If the Sessions reverse the first Order, and that being removed appears not to be good, we must intend it was reversed for Form and affirm the Order of Reversal.

So if the Sessions affirm the first Order, and that appears to be good, he must affirm the Order of Sessions.

But if the first Order appears bad, and the Sessions affirm it, this Court must reverse it, because it appears naught.

S H E R I F F S.

Vide 10 Co. Dominus Rex *versus* Daws. Hill. 13 Will. III. B. R. 99, 100.

1 Salk. 99,

175.

Sheriff may
take Bail-
Bond on an
Attachment
of Contempt,
but the Pro-
secutor may
refuse to ac-
cept it.

Mod. Caf.

122.

S. C. Cases

B. R. 579.

DAWS was taken upon an Attachment for a Contempt die veneris prox. post Crastin. Sanctæ Trin', and the Sheriff took a Bail-Bond for his Appearance, and suffered him to be at large: Daws would not appear, the Sheriff was amerced. The Prosecutor refused to accept the Assignment of the Bail-Bond; and Raymond moved, That farther Amerciaments might be stayed, and that the Prosecutor might accept of the Bail-Bond, which was but in 40 l. and the Prosecutor thought it too little: He urged, the Sheriff was bound by the Statute to bail and set him at large, and cannot seize him after the Return; he has done all he can, and ought not to be amerced for not doing more than he can. No Action lies against him in such Case, there ought for the same Reason to be no Amercement. The Court agreed, That a Bail-Bond may be taken on an Attachment, but said they could not oblige the Plaintiff to accept the Bail-Bond, it might be insufficient; if it was, the Sheriff might thank himself; if it be sufficient, he may by suing the Bail-Bond, reimburse himself.

Statutes in General, and the Exposition thereof.

See 2 Inst. 301.
2 Leon. Caf.
114.
3 Co. 13.
Vaugh. 169,
170, 373.
Ray. 54, 191,
355, 356.

Rex & Regina *versus* Barlow. 5 W & M. B. R.

INDICTMENT on 14 Car. 2. c. 12. against Church-war-
dens and Overseers, for not making a Rate to re-imburse
the Constables: Exception was taken, That the Statute
only puts it in their Power to do so by the Word may, &c.
but does not require the doing of it as a Duty, for the Omission
of which they are punishable: Sed non allocatur; For where a
Statute directs the doing of a Thing for the sake of Justice or the
publick Good, the Word may is the same as the Word shall;
thus 23 H. 6. says, the Sheriff may take Bail; this is con-
strued, he shall; for he is compellable so to do.

(1.)
Where a Sta-
tute directs a
Thing of a
publick Na-
ture, may is
understood
as shall.
Q. Cro. Jac.
134.
Cro. El. 655.
2 Inst 118.
Comb. 220.
S. C. Carth.
293.
Skin. 370.
Ser. and
Rem. 212.

Bennet *versus* Talbot. Hill. 8 Will. III. B. R. Vide
Title Declaration, pl. 2. pag. 212. (2.)

Mills *versus* Wilkins. Hill. 2 Ann. B. R.

S. C. 6 Mod.
62.
3 Salk. 331.
Holt 662.
2 Hawk. P.
C. 247.

TRESPASS for taking several Skins from the Plaintiff:
the Defendant as an Officer justified on 1 Jac. 2. cap. 22.
about Tanning, and set forth the Title of the Act, mistaking a
Word, by which it varied from the true Title, and averred the
Skins were not dyed according to the Intent of the Statute;
to which it was demurred, because no such Act as is here set forth.
Vide Cro. Car. 232. 3 Keb. 648. On the other Side it was an-
swered, That the Title is no Part of the Act; that old Statutes
have no Title, and the Opinion of Hale C. Baron was cited.
Hard. 324. Vide Hut. 56. Hob. 310. 11 Co. 33. 4 Inst. 345. Holt
C. 3. The Title is not a material Part, neither is it necessary
to set it forth; but yet it is a Name given by the Makers, and
therefore you must describe it accordingly if you will describe it by
its Title; and they denied the Opinion of my Lord Hale, saying,
it was a sudden Opinion. Judgment for the Plaintiff.

(3.)
Title no part
of Statute,
but if set out
wrong, is fa-
tal.
Vid. 4 Co 48.
Cro. Car. 232.
1 Jon. 50.
Cro. Jac. 140.
Ray. 191,
192.
Hard. 324.
3 Cro. 186.
Saund. 128.
3 Keb. 641,
642, 648.
Dyer 324.
Hob. 310.

Statutes,

Statutes, and the Exposition thereof.

S. C. 1 Show. 241, 266. *Hobbs qui tam versus Young.* Trin. 3 W. & M. B. R. Intr. Hill. 1 W. & M. Rot. 129.

(1.)
 Exercising a Trade by others is within the Stat. 5 Eliz. Vid. Post Pl. 2, 3, & 7. 3 Mod. 313. S. C. Carth. 162. Comb. 179. Shower 266. 11 Co. 53. b. Cro. Car. 347, 516, 517. 6 Mod. 21. Cro. Car. 516, 517. 1 Saund. 10. 1 Rol. R. 10. Hob. 211. 2 Bulst. 187. 1 Cro. 347, 349, 516. 8 Rep. 130. 11 Rep. 54. 1 Sid. 303. Cro. El. 872. Holt 66.

DEBT on 5 Eliz. for using the Trade of a Clothworker not being brought up an Apprentice; upon Nil deb the Jury found, That the Defendant was a Turkey Merchant, and exported Woollen Manufacture into Turkey, and that he employed Clothiers that had served Apprenticeship to work the Clothes in his own House, at his own Charge, and with his own Materials which he sent into Turkey as Merchandize, but that the Defendant never served an Apprenticeship. Per Cur': 1st, The Defendant is the Trader in the Case, and the Person that exercises the Trade, because he employs the rest, who work but as his Servants, and the Loss and Gain is to be his.

2dly, This is a Trading within the Statute; because the Cloth is not confined to the Use of his own Family, but vend out for the sake of Commerce; and whether the Utterance be in England or in Turkey, is not material.

3dly, That he that hath not served an Apprenticeship is by this Statute restrained to work as a Trader, either by himself or others; for the Intent of this Act is to annex the Benefit of the Trade to such as underwent the Hardship of Learning it, thereby to encourage Labour in Youth: And few would undergo the Trouble of being Apprentices, if they might employ others to work for them.

4thly, This is a negative Statute, and no one shall exercise the Trade against it, unless by Virtue of a Custom, as the Widow of Tradersmen, who by Custom carry on the Trade of their Husbands, which the Court held not within the Statute. Hutt. 13 Noy 5. 1 Saund. 312. 2 Bulst. 191. Cro. Car. 516.

Dominus Rex *versus* Paris Slaughter. Hill.
11 Will. III. B. R.

BRODERICK moved to quash an Indictment on 5 Eliz. c. 4. (2.)
for using the Trade of a Fellmonger, not having been an Indictment
Apprentice seven Years; he urged, That this was a Business re- foreexercising
quired no Skill, for it was only to pull the Wool from the Skin. the Trade of
the cited 1 Cro. 499. Information for exercising the Trade of a Fellmonger
Wemp-dresser reversed. One Pasch. 4 Jac. 2. for exercising the contrary to
Trade of a Wool-comber, quashed. Of a Pippin-monger rever- 5 Eliz. not
sed. Sed per Holt C. J. If in the Indictment it be averred to be quashed, be-
a Trade at the Time of making the Statute, we will not quash cause a verr'd
it; for whether it was a Trade then or no, or whether any Skill to be a Trade
requisite to the Exercise of it; is Matter of Fact proper for at the Time
the Trial of a Jury: And there are many Trades within the ge- of making
neral Words and Equity of that Act, besides those that are men- the Act.
tioned therein. The Case of a Costermonger is not yet deter- Vide pl. 1.
mined, and the Case of an Upholster 2 Bulst. 186. is not Law. &c. 7.
The Court would not quash it. S. C. Holt 68.
Cases B. R.
311.

Domina Regina *versus* Harper. Trin. 4 Ann. B. R.

INDICTMENT for using the Trade of a Merchant-Taylor (3.)
contrary to the Statute 5 Eliz. Serjeant Broderick moved to Where the
quash it, because 'tis not a Trade within the Statute. Quashed Trade is a-
Nisi. Some Days after Mr. Eyre moved to quash an Indictment verr'd to be a
against Cornish, for using the Trade of a Seamstress, not having Trade at the
served as an Apprentice; and the Court refused, because it was set Time of the
forth in the Indictment to be a Trade in England at the Time of Act, the
making the Act; wherein the Words are, Any Craft, Mystery or Court cannot
Occupation now used. So that if this Trade of a Seamstress intend it not
is not within the Act, the Defendant would have the Advantage within it.
of it upon the Trial. But as to Harper's Case, which Mr. Eyre put them in Mind of, the Court seemed to think a Merchant-Taylor was Nonsense and unintelligible; they did not know what Merchant-Taylor meant, and so it differed. It is a good Exception that it is not averred in the Indictment, That the Trade herein mentioned was a Trade at the Time of making the Statute. Domina Regina *versus* Cornish, eodem termino.

Billings *versus* Eads. Mich. 4 Ann. B. R.

(4.)
H. may let
Coach-
Horses and
Coach-man
without a
Licence.

TRESPASS and Special Verdict found; the Case was, Gentlemen had a Coach and Harness of his own, and gave an Inn-holder 100 l. per Annum to find him a Pair of Horses and a Coachman: And the Question was, Whether he could do this without a Licence to keep a Hackney-Coach, upon 5 & 6 W. & M. c. 22? Et per Cur', Tho' in the Beginning of the licensing Clause, sect. 3. and in the prohibiting Clause, sect. 5. Hackney-Coach or Coach-Horses are mentioned in the Disjunctive, yet that must be understood of Coach-Horses to be used with a Hackney-Coach, because all other Provisions in the Act, viz. the Number, the Fine, the Rent, and the whole Revenue reserved, is confined to Hackney-Coaches; and the Party cannot forfeit, but where the Commissioners may licence; and 'tis an Act of Restraint.

Anonymus. Mich. 4 Ann. B. R.

(5.)
Construction
of the Stamp-
Act.

A Warrant of Attorney for entering up a Judgment written upon a Paper, which likewise contained a Bond and had only one Stamp, whereas by the Act concerning Stamp-Duties it ought to have two Stamps: Judgment was entered up by Virtue of this Warrant. And now it was moved That the Judgment and Execution might be set aside for this Cause. Sed per Cur', There may be Reason to refuse such a Warrant of Attorney in Evidence, but no Reason to make it void; for there is nothing in the Act that imports that.

Dunn qui tam *versus* Hinchdy. Pasch. 5 Ann. B. R.

(6.)
Debt sur
Stat. 10 W.
3. c. 2.
Vide 3 Lev.
290, 374.

DEBT upon the Statute 10 W. 3. c. 2. for twelve Dozen Buttons, made de ligno tantum in Imitation of, &c. The Jury found the Buttons were all Wood but the Shanks, which were Brass, and that they were made in Imitation, &c. and that there were Buttons made de ligno tantum, &c. Weld said, That now it appeared the Statute was applicable and might have Effect upon other Buttons, and that a Penal Law was to be construed strictly, and not by Intendment. Vide 2 Inst. 199. Pl. 47. a. But the Court resolved they were prohibited by the Act for the Shank is no Part of the Button, but added to fasten it. And if Buttons thus made in Imitation, &c. by having a brass Shank added, should be out of the Act, it would be in every Body's Power to evade it. Adjudged.

Domina Regina versus Maddox. Pasch. 5 Ann. B. R.

PER Cur'. Upon Indiments on the Statute 5 Eliz. in Evidence we allow following the Trade for seven Years to be sufficient without any binding, this being a hard Law.

(7.)
Exposition
of 5 Eliz.
Vide ante pl.
1, 2 & 3.
Cumber.
254, 255.

Statutes of Hue and Cry.

Stat. of Win-
ton 13 Ed. 1.
c. 12. and 27
El. c. 13.
Vide Hale's

P. C. 71, 72. 3 Inst. 68. Dalt. c. 100. Staund. P. C. 27. 1 And. 116. 2 Sid. 44. 1 Sid. 139.

Ascomb versus The Hundred of Spelholm. Mich. 2 W. & M. B. R. Intr. Hill. ult. Rot. 901.

S. C. 1 Show.
94, 241.
3 Mod. 287.
S. C. called.

Ascomb versus the Hundred of Elthorn. Carth. 145. Holt 637.

AN Action was brought by the Master, for the Robbery of A. and B. his Servants: The Jury found the special Matter, and that B. was a Quaker and would not take the Oath, viz. That he knew none of the Robbers. Et per Cur', 1st, The Master may sue for the Robbery of his Servant, and the Oath of the Servant is sufficient. 2dly, The Servant may also sue, for he had the Possession. 3dly, If the Servant be robbed in the Presence of the Master, the Master must sue, and the Oath of the Master is sufficient. 4thly, As to B. who refused to swear, the Hundred is not liable; for the Statute of Eliz. was made in Favour of the Hundred to prevent Confederacy and Combination between the Thieves and the Party robbed, and was the Master's Folly to employ such a Servant.

(1.)
H. robb'd, re-
fusing to take
the Oath,
cannot sue.
Vide post pl.
3.
1 Co. 6, 7.
Servant
robb'd of his
Master's
Goods, Ma-
ster may sue.
Vide infra, &
ante 440, 441.
2 Saund. 380.
S. C. Carth.
145. called
Ascomb
versus the
Hundred of
Elthorn.

Combs versus The Hundred of Bradley. Pasch. 5 & 6 W. & M. B. R.

Vide Style's
Rep. 156, &c.
supra.

An Action against the Hundred, the Plaintiff declared, that he was possessed ut de bonis suis propriis, &c. The Jury found the Plaintiff was a Servant, and was robbed upon the Road

(2.)
Servant
robb'd of his
Master's Mo-
ney may have
an Action a-
gainst the
Hundred.

Hundred. S. C. 4 Mod. 333. Comb. 263. Holt 37. Cases B. R. 54.

Comb. 263. of 30l. of his Master's Money, and 20s. of his own. Et per
 4 Mod. 303. Cur. The Action well lies by the Servant, for the Money
 Latch 127. his, and he is possessed ut de bonis propriis against all, and in
 Respect of all but him that hath the very Right: If a Servant
 be robbed of his Master's Goods, he may maintain an Appeal
 Robbery.

Vide 1 Show.
 60.

Dowly *versus* The Hundred of Odium. Mich.
 6 Will. III. B. R.

(3.)
 Declaration need not set forth the Oath to be taken before a Justice of Peace of the Hundred. Vid. ant. pl. 1. 7 Co. 6, 7. Noy 155. 2 Vent. 215. 2 Saund. 425. 3 Salk. 184.

IN an Action upon the Statute of Hue and Cry, a Verdict was
 for the Plaintiff; and Mr. Clark moved in Arrest of Judgment, That it appeared the Oath was taken before a Justice of Peace of the County, and not a Justice inhabiting within the Hundred, according to 27 Eliz. But the Court held it good notwithstanding that, for the Statute of Winton says no such Thing, and 27 Eliz. does it only by Way of Direction; and the Declaration had been good tho' it had not shewn an Oath taken before any Justice at all.

Cowper *versus* The Hundred of Basingstoke. Hill.
 1 Ann. B. R.

(4.)
 Assault in the Hundred of A. and Goods taken in B. B. is chargeable. See 2 Cro. 675. March 11. Noy 52, 155. 1 Leon. pl. 72. 1 Sid. 263, 367. 4 Co. 41, 42, 47. 5 Co. 2. Pl. 39. 1 Co. 99. Hale's P. C. 54. S.C. Far. 157. Rep. A. Q. 8. Holt 638. How Murder has Relation to the Stroke. 1 Hawk. 79, 80. 2 Hawk. 180, 181, 320.

IN Debt on the Statute of Hue and Cry, a Special Verdict was found, That the Plaintiff was travelling in the Highway in the Hundred of Michael-River, where he was set upon and carried into the Hundred of Basingstoke, and robbed in a Copple in the Highway of this Hundred: The Question was, Whether the Hundred should be liable? And it was adjudged, That the Hundred of Basingstoke should, for there the Robbery was committed and not before; and if these had been two Counties, it is certain the Indictment of Robbery must have been brought in the last where the Goods were taken, and not in the first where the Fault was made: Also the Hundred is not liable for not preventing the Robbery, but for not taking the Robbers; for if they are taken, the Hundred is excused. Vide Hutt. 125. Goldsb. 8. It was objected, That the taking, &c. should relate to the Fault, and so it was a Robbery ab initio, like the Case of Murder, where 'tis certain there shall be a Relation to the Stroke which was the Cause. In Answer to which the Court took the Diversity. As to Forfeitures there shall be a Relation to the Cause; so if there be a Pardon of the Stroke, it shall discharge the Murder; but after the Stroke, if one knowing thereof receives him, or if a Constable arrests him and lets him go, the Receiver is not Accessary to Felony, nor the Constable a felon.

It is not a Felony till Death insue. 11 H. 4. 12. b. Otherwise
 as to collateral Purposes; for if the Stroke and Death are laid
 at different Days, and the Indictment concludes, Et sic murdravit
 & loco of the Stroke, it is naught; but the Day and Place of
 his dying is well. 4 Co. 41. Plowd. 401. But here the Assault is
 not a necessary efficient Cause of the Robbery, as a Stroke in
 Murder is; therefore there is no Relation in this Case, because
 no Necessity. It was objected, What if one be taken in the Hun-
 dred of A. and carried into the Hundred of B. into a House there,
 viz. a Mansion-House, and robbed, or taken in the Day-time in
 A. and carried to B. and there robbed in the Night, shall there be
 no Remedy? And the Court said those Cases were not provided
 for by the Statute. Adjudged per Holt & totam Cur'. Also he
 said as to the Assault's being in the Coppice, That it was not ne-
 cessary the Robbery should be in the Highway to charge the Hun-
 dred. And yet see Cro. Car. 267. where 'tis said, That the Inha-
 bitants are not bound to keep Watch in a new Highway, or to
 make Amends for a Robbery therein committed.
 Who chargeable to the Hundred on a Hue and Cry, vide
 Saund. 423.

1 Show. 60.
 3 Salk. 184.
 3 Mod. 258,
 287.
 5 Mod. 150,
 160, 263.
 2 Saund. 379,
 380, 423.
 4 Mod. 383.

Vide S. P.
 1 Show. 60.
 Comb. 150.
 1 Goldsb.
 155, 156.
 2 Goldsb.
 280.
 1 Hawk. 202.
 Cro. Car. 267.

Subsidies, Taxes, and Customs.

newster versus Kitchel. Hill. 9 Will. III. B. R.
 Vide *The State and Resolution of this Case*, Title
 Covenant, pl. 4. pag. 198.

IN the Debate of this Case it was laid down by Holt C. J.
 That the Word Taxes, generally spoken with Reference to a
 Freehold, or where the subject Matter will bear it, shall be in-
 tended parliamentary Taxes propter excellentiam. 34 H. 8. S. C.
 Vinzim. 9. But there be other Taxes not parliamentary, as
 repair of Churches, Commission of Sewers; for any Imposi-
 tion which takes away Part of his Goods or Rent, is a Tax.
 Inst. 532.

The ancient Way of Taxing was by Tenths and Fifteenths, then
 Subsidies, after that by Royal Aids; at last by a Pound-Rate:
 the former were all on the Person or personal Estate, and were
 much the same Thing: The later was upon Rents and Lands.

Tenths
 Different
 Manners of
 Taxing, and
 when intro-
 duced.

(1.)
 Taxes in ge-
 neral means
 parliamen-
 tary.
 5 Mod. 368.
 S. C.
 Comb. 424,
 466. S. C.
 1 Salk. 198.
 S. C.
 S. C. Carth.
 438.
 3 Salk. 340.
 Cases B. R.
 166.
 Holt 175,
 669.

Tenths and fifteenths were the most ancient. Vide Spelman verbo Quindecima. In 8 Ed. 3. a Valuation was made on all the Towns in England, and returned into the Exchequer, which became the standing Measure for taxing. 2 Inst. 76, 77. From thence when a Tax was given, the Officers of the Exchequer could easily compute what each Town was to be charged with, and what it came to. Vide 11 H. 4. 35, 36. Bro. Quinz. 9.

The first Subsidy was in and by 32 H. 8. cap. 50. which was a Tax upon the Person for his Lands and Goods, payable by the Party where he lived. This continued till 15 Car. 1.

The Assessment of Tax, according to a Pound-Rate, came in 17 Car. 1. In these Assessments there was a Clause to impose on the Tenant to deduct: So it was in 1642, 1644, 1649. And then; and upon this Account it was, that in Consequence it came to be provided, that there should be no Deduction of Taxes.

Trowel versus Ellford. Trin. 5 Ann. B. R.

(2.)
H. may be
assessed to the
Land Tax
either where
he dwells or
carries on his
Employ-
ment.

TRESPASS against the Collectors of the Land-Tax; the Case was, That the Plaintiff lived in Middlesex, but exercised and followed the Business of a Factor in Smithfield; and the Question was, whether the Commissioners of Middlesex, where he lived, could tax him as living in Middlesex, or he should be taxed by the Commissioners of London as following his Business in Smithfield? And Holt C. J. held, That the Action lay, and that he was not taxable by the Commissioners of Middlesex, for by the very Words of the Act, he is to be taxed in the Place where his Office is exercised; Ceteri Justic. contra, for this is not an Office which is local, but an Employment which is personal, and the Person is taxable where he lives; and the affirmative Words of the Act are directory: He is taxable in either Place.

Robinson versus Stephens. Mich. 8 Ann. In C.

(3.)
Where there
shall be De-
duction for
Taxes out of
Annuity, and
where not.

IF one covenants to pay an Annuity to J. S. the Covenantor shall not deduct for Taxes; for the Charge is on the Person of the Covenantor, and not the Land: So if H. having a Term for Years, devises an Annuity to J. S. and his Heirs, there shall be no Deduction for Taxes, for the Term for Years is no otherwise chargeable with it, than as it is Part of the personal Estate, for it cannot be said to issue out of the Term, when in Point of Duration it may continue much longer: So if H. grants an Annuity to J. S. and afterwards secures it out of a real Estate, there shall be no Deduction for Taxes; for the Subsequent Se-

city cannot lessen the Effect of his former Grant, which in its Creation was Tax-free. Per Cowper Lord Chancellor, at his House.

Paul *versus* Shaw. Hill. 8 Ann. In Cam' Scacc'.

ASSUMPSIT for 500 l. received to the Use of the Plaintiff; on Non Assumplit a special Verdict was found, That King Charles I. gave to J. S. and his Heirs, the Duty of Prifage of all Wines imported, to hold discharged of all Aids and Tares; and the Question was, Whether the Grantee should pay Connage for this upon 9 & 10 W. 3.^d Note; The Duty of Connage was first imposed per 12 Car. 2. c. 4. viz. 4 l. 10 s. on all French Wine; then comes 1 Jac. 2. c. 3. and imposes 8 l. per Ton on French Wine, with a Clause, that the Grantee of Prifage should pay the Duty; then comes 7 & 8 W. 3. c. 20. which imposes 25 l. per Ton; after that comes 9 & 10 W. 3. c. 23. which imposes over and above, a Duty of 4 l. 10 s. to be levied according as it was by 12 Car. 2. And it was adjudged in the Exchequer, that the Grantee should not pay this Duty of Connage: Upon this Error was brought; and it was said for the Grantee, That this was an ancient Royal Revenue, that if the Crown now held it, Connage could not be due, the Queen could not pay Duty of Connage out of her own Prifage; that the Grantee claimed under the Crown, and ought to have the same Privilege and Exemption, the rather because it was granted with this Immunity. But per Trevor C. J. and seven other Judges in the Exchequer-Chamber, it was answered and resolved, That immediately on Importation, this Duty of Connage attached upon the Wine, and the Grantee receives whatever Part he takes for Prifage charged with the Duty; and this must be presumed to be the Intent of the Law; for it cannot be imagined the Law meant to raise this Duty on the People to enrich a private Man, which could be the Effect, if he may have his Prifage Custom-free: And the Grantee paid the Connage imposed by all former Laws. As to the Reasons on the other Side, they answered, If Prifage had remained in the Crown, it could not have paid by reason of the Unity of Possession, it being absurd, that the Queen could be chargeable with a Duty to her self; but this Exemption only personal, and the Duty revives when Prifage comes to a subject, who may pay the Duty to the Crown, as where a Parson leases his Glebe. And as to the Covenants or Clause of Discharge in the Grant, that could only extend to the Connage then Being, which he, tho' King, had himself, and not to what he did not, but might be given to his Successors. And the Judgment was reversed.

(4.)
Prifage, an ancient Duty on Goods granted away by the Crown is chargeable with other Duties charged on the same Goods while in the Grantee's Hands.

Concerning Prifage, vid. Hardr. 56, 97, 218, 301, &c. 477.
Davis 17.

Post 620, 621.

SURRENDER.

S. C. 3 Lev.

284.

2 Vent. 198, In the Case of Thompson *and* Leach. Hill. 9 Will. II.

199, &c.

Ante 576,

427, & 565.

Surrender

vests the E-

state in the

Surrenderee

without his

express Ac-

ceptance.

3 Mod. 301.

296. S. C.

Cases in

Parl. 150.

Show. 296.

Co. Lit.

266. b.

S. C. Eq. Ab.

178. p. 3.

3 D. 164. p. 13.

3 Salk. 300.

3 Lev. 284.

Comb. 438,

468.

Carth. 211,

250, 435.

Holt 357,

623, 665.

Cases B. R.

475.

B. R. (*Which see Title Remainder, pl. 2.*)

THE Court held, That a Surrender immediately vests the Estate out of the Surrenderor, and vests it the Surrenderee; for this is a Conveyance at Common Law, to the Perfection of which no other Act requisite, but the bare Grant; and tho' it be true, that every Grant is a Contract, and there must be an Actus contra actum or a mutual Consent; yet that Consent is implied; a Gift imports a Benefit, and an Assumpsit to take a Benefit may well be presumed; and there is the same Reason why a Surrender should vest the Estate before Notice or Agreement, as why a Grant of Goods should vest a Property, or Sealing of a Bond to another in his Absence, should be the Obligee's Bond immediately without Notice. 2 Vent. 198. 3 Levinz 284. Shower 150.

See 3 Lev. 285. That the Judgment in the principal Case was reversed in the House of Peers, in 1692.

T A I L.

Vide ante
570.

Symonds *versus* Cadmore. Hill. 4 & 5 W. & M. B. R. (1.)
Rot. 743. Vide *this Case*, Title Fines, pl. 3. pag. 338. S. C. 1 Salk.
338.
1 Show. 370.
4 Mod. 1.

Machil *versus* Clark. Trin. 1 Ann. B. R. Intr. in B. R. S. C. Farell.
18.
Holt 615.
Rep. A. Q.
19.
3 D. 198.
p. 10, 11.

Pasch. 12 Will. III. Rot. 342.

TENANT in Tail covenanted to stand seised to the Use of himself for Life, Remainder to John his eldest Son in Tail, and afterwards suffered a Common Recovery with single Voucher, wherein he was Tenant to the Use of himself for Life, Remainder to A. in Tail, is void; because the Remainder is to take Effect after his Death. 1 Mod. 98, 121, 159, 175. 3 Lev. 126, 306, 307, &c. 2 Lev. 75, 213, 225. 2 Mod. 207. 1 Vent. 372.

Recipe: And the first Question was, What Operation the Tenant had? For if it made any Alteration in the Estate-tail, the Recovery did not bar; and if it did not, the Recovery and single Voucher did bar. The Court held the Recovery good, and affirmed the Judgment; and Holt C. J. delivered the Opinion of the Court, and gave the Reasons for it, the Sum of which was, That if Tenant in Tail by Covenants to stand seised, or by Lease and Release, or Bargain and Sale, conveys to another and his Heirs, 'tis a base Fee, not determined nor determinable at the Entry of the Issue; for before the Statute de donis, he had a Fee-simple; and the Statute does not alter the Nature of the Estate, but restrain the Power of Alienation; and therefore he might before the Statute, so he may since; the Statute only makes it voidable.

Andly, he has the whole Estate in him, and therefore must be Bargainee of Tenant in Tail has a descendible Estate.
able to divest it, and so he said was Seymour's Case in Point, 2. Tenant in Tail bargained and sold, the Bargainee has a descendible Fee. This Case he held for Law, but denied the Case Took and Glasgow, 1 Saund. 260. and likewise Litt. §. 612. if he taken literally.

Andly, This appears from 3 Coke 84. If Tenant in Tail What Conveyances by Tenant in Tail are defeasible by the Entry of the Issue.
ants a Rent, Advowson, &c. 'tis not void as to their Issues,
voidable; for if he brought a Formedon, the Defendant may
had a Warranty. Vide Winch 5. But this is still more
parent from the common Case, where Tenant in Tail makes
Vol. II. E c a Lease

a Lease not warranted by the Statute, 'tis not void as to the Issue, but voidable; and Tenant in Tail may exchange with Tenant in Fee, in which Case a Fee is given and taken without Livery: Ergo, Tenant in Tail may also by Covenant to stand seised. If Tenant in Tail by Lease and Release, by Bargain and Sale, or by Covenant to stand seised, convey to another or his Heirs, the Estate-tail is not in Abeyance, but in the Alienee for the Law puts nothing in Abeyance, but of Necessity; and is not in the Tenant in Tail; for he cannot bring Waste, &c. *Vi Hob. 339. Yelv. 51. 1 Leon. 110. 1 And. 191. 3 Cro. 895.* It is held that the present Conveyance did produce no Alteration of the Estate-tail, because the Estate in Remainder was to commence after his Death; and took this Difference.

If Tenant in Tail make a future Lease for Years, which Possibility may be to commence during the Life of Tenant in Tail, it is not void, but voidable as to the Issue.

But if it be a future Lease to commence after the Death of Tenant in Tail, 'tis meerly void in its Creation; for 'tis not to commence till the Title of the Issue commences, and that is an elder Title concurring with it; and if the Law should make otherwise than void, the Law would make him a Trespasser. *Vi Dy. 279. Pl. 7. 2 Cro. 565.*

Tenant in Tail covenants to stand seised to the Use of A. and his Heirs, or A. for Life with Remainders, it deveys the Estate-tail; otherwise if the new Use be to take Effect after his Death.

So in Covenant, if one covenant to stand seised to the Use of A. and his Heirs, or to the Use of A. for Life, Remainder to B. in Fee, the Covenant is not void, but puts the Estate-tail out of the Covenantor.

But if Tenant in Tail covenant to stand seised to the Use of A. and his Heirs after his Death, 'tis void.

So it is in the case at Bar, Tenant in Tail covenants to stand seised to the Use of himself for Life, Remainder to J. and his Heirs; for the Remainder is to take Effect after his Death, when by his Death the Title of the Issue commences, and the Covenant as to the Estate for Life to himself is void in the Case, because here is no Transmutation of Possession; such Covenant is in any Case only good in respect of the Remainder, and since the Remainders are void, the Covenant and the Estate are likewise void.

Idle versus Coke. Pasch. 4 Ann. B. R.

(3.) Surrender to A. for Life, Remainder to A. and his Wife for their Lives, and their Heirs and Assigns; and for Default of such Issue to A. and his Heirs, is a Fee in A. and his Wife. *S. C. 3 D. 186. p. Rep. A. Q. 57. Holt 164.*

H. Seised in Fee of a Copyhold, surrendered the same to the Use of himself for Life, and after that to Valentine his Son and Alice his Wife, pro & durante terminis vite sue naturalium & hereditariarum suarum naturalium & hereditariarum. Et pro defectu talis exitus, to the Use of himself and his Heirs. And it was held per totam Curiam

1st, That a Limitation of Uses in a Copyhold Surrender must be construed by the same Rules, and in the same Manner as if it were a Limitation in a Deed of Feoffment, or any other Conveyance at Common Law; and that the Intent of the Party is not sufficient as in a Will, for the Statute 21 H. 8. leaves the Testator at Liberty to express his Intent as he pleases; but the Common Law ties up Conveyances to set Form and set Words.

Vide ante 618.
Surrender to be construed as a Conveyance at Common Law.

2dly, In a Gift in Tail it must be limited of what Body the Issue is to come; so as it may appear by the express Words, or something tantamount or equivalent; and therefore a Gift to H. and his Heirs Males, or a Gift to H. and his Heirs Females, is not an Estate-tail; because it is not said, nor does it appear of whose Body they are to issue. At Common Law this would not have been a Fee conditional; and the Statute de donis does not create Estates-Tail, but preserves them: A Fee at Common Law was either absolute or restrained; those restrained Fees were either restrained as to Duration, as a Gift to A. and his Heirs, while such a House stood, &c. which was a base Fee; or restrained as to what particular Heirs, or of whose Body issuing should inherit, which was a Fee conditional, and is by the Statute turned into an Estate-tail: Ergo, this is a Fee-simple at Common Law, and is so at this Day; for there are Words to create an Estate of Inheritance; but none to restrain that to Issue or Heirs to the Body of the Party: But a Gift to a Man and his Heirs Males of his Body, is an Estate-tail; so is an Estate

In a Gift in Tail it must appear of what Body the Issue are to come.

to Husband and Wife, & hæredibus de ipsis procreatis, for de ipsis is tantamount; so if a Gift be to H. and his Heirs, if he have Issue of his Body; and if he die without Heirs of his Body, the Remainder to himself and his Heirs, for here is an Inheritance created, and it is manifest he meant Heirs of his Body, & voluntas donatoris in Charta doni sui manifestè expressa de cætero observetur, and this is a necessary Implication. Jenk. 171. H. 6. 6. So if a Gift be to A. & hæredibus suis si hæredes de carne sua habuerit, & si nullos hæredes de Carne sua habuerit, Remainder to the Donor: So if Lands be given to A. & si contingat ipsum obire sine hæredibus de corpore suo, Remainder to the Donor, is an Estate-tail, per Holt C. J. tho' not given to him and his Heirs. Quære.

Fee absolute, base, restrained, conditional.

3dly, They agreed Beresford's Case, viz. A Feoffment to the Use of A. for Life, Remainder to B. and the Heirs Males of the said B. lawfully begotten, and for Want of such Issue lawfully begotten, to, &c. to be an Estate-tail; for of the said B. is de dicto B. or ex dicto B. which is sufficient to denote ex quo corpore; so if it were in Latin, remanere prædict. B. & hæredibus de dicto B. or ex dicto B. But if it were in Latin remanere dicto B. & hæredibus suis, or hæredibus ipsius & pro defectu talis exitus, Remainder over, it had been no Estate-tail.

By what Words Tail may be created. Vide Co. Lit. 20. 10 Co. 87. Moor Cas. 940.

4thly, They agreed Beresford's Case, viz. A Feoffment to the Use of A. for Life, Remainder to B. and the Heirs Males of the said B. lawfully begotten, and for Want of such Issue lawfully begotten, to, &c. to be an Estate-tail; for of the said B. is de dicto B. or ex dicto B. which is sufficient to denote ex quo corpore; so if it were in Latin, remanere prædict. B. & hæredibus de dicto B. or ex dicto B. But if it were in Latin remanere dicto B. & hæredibus suis, or hæredibus ipsius & pro defectu talis exitus, Remainder over, it had been no Estate-tail.

To B. and the Heirs Males of the said B. Lawfully begotten, and for Default, &c. over is Tail.

Vol. II. E c 2 4thly,

4thly, It was agreed per Holt C. J. Powys and Powell Justices, That Valentine and Alice had a Fee-simple, and not an Estate-tail, because the Words, & pro defectu talis exitus import nothing of their dying without Issue; it is not said pro defectu talis exitus de corporibus dict. Valentini & Aliciæ, or de prædictis Valentino & Alicia, but generally, whereas every Heir is the Issue of some Body. If there had been particular Words expressed, as if they die without Heirs of their two Bodies, there might be Reason to turn the express Estate of Fee-simple raised into Tail, which cannot be altered upon a bare Implication, though rather in this Case, because of the Word Assigns; for an Estate-tail is not an assignable Estate. 7 Co. 40. Litt. Rep. 344. 1 Cr. 363. 3 Cro. 478. Plowd. 541. 3 Leon. 5. Hob. 32, 37. Aff. 1 Cr. 366. 2 Sid. 41. Gould J. contra, because the Intent of the Party was to create an Estate-Tail, and the Word of in English is equal and tantamount to de or ex in Latin.

Of equal to
de or ex in
Latin.

Tender and Refusal, Amends, &c.

Vide 5 Co.
114, 115.
8 Co. 147.
Litt. Rep. 33,
34.
2 Inst. 107.
1 Lev. 44.

Giles *versus* Hart. Mich. 9 Will. III. B. R.

(1.)
To a general
Assumpsit,
Tender and
Refusal must
be pleaded
with a Tout
temps prist,
which cannot
be after
Impar lance.
2 Lev. 209.
3 Lev. 24,
103, 146,
277, 440.
1 Show. 129,
130.
Comb. 441,
334.
Ven. 322.
S. C. Comb.
443.
Carth. 413.

INDEBITATUS ASSUMPSIT and Quantum meruit and that being requested at such a Day and Place, the Defendant refused to pay: The Defendant pleaded, That such a Day before the Request, he tendered, and the Plaintiff refused; and that afterwards he was always ready, and tendered the Money into Court: Plaintiff demurred, because the Defendant had imparled, and because it is not pleadable in an Assumpsit, and because here was no Answer to the special Request. per Holt C. J. Where the Agreement is to pay at a certain Time, Tender at that Time, and always ready, is a good Plea; but where the Money is due and payable immediately by the Agreement, the Party must plead tout temps prist from the Time of the Promise. But this cannot be after Imparlance, for by that it appears he was not always ready; otherwise if no Imparlance; then

2

3 Salk. 343. Holt 556. Cases B. R. 152.

might have pleaded tout temps prist notwithstanding the Special Request laid in the Declaration, because it was immaterially alleged there; so in Debt, tho' the Plaintiff lay a Special Request, the Defendant may plead semper paratus, and pray Judgment de dampnis: And the Plaintiff may reply a Special Request to shew the Defendant was not always ready: So in the principal Case: Yet there is a Difference between Debt and Assumpsit; for in Debt the Damages are but accessory; but in Assumpsit are the Principal: Therefore in Debt, The Defendant may plead in Bar of the Damages; but in Assumpsit the Defendant ought to plead Always ready, with a Profer in Cur, and demand Judgment de ulterioribus dampnis.

S. C. Carth. 413.
In pleading Tender in Debt, Defendant prays Judgment de dampnis. In Case de ulterioribus dampnis.

Sweatland versus Squire. Hill. 10 Will. III. B. R.

INDEBITATUS ASSUMPSIT: The Defendant pleaded that before the Action, viz. Such a Day, he tendered the Sum of so much Money, and that he was always after ready, and now is ready, and prays Judgment de dampnis; Plaintiff demurred. Et per Cur, It is not enough that he was always ready since the Tender; the Money was due before, and the Neglect of Payment was a Delay, a Breach of Contract and a Cause of Action; now there is no Damages for that, but those Damages and all that Part of Time remains unanswered, in respect of which the Plaintiff ought to have Judgment. Note; The Counsel for the Defendant said, that Interest was due for the Time unanswered, and Damages would be recovered in respect of that Interest. Quod sit negatum per Powell J. Interest is recovered by Way of Damages, where Damages are recovered ratione detentionis debiti; but not where Damages only are recovered, for Interest is not recovered occasione dampnorum. Judgment pro quer.

(2.)
Tout temps prist.
Lutw. 226, 283, 368.
Comb. 443, 444.

Interest not recoverable where Damages only are recovered.

Lancashire versus Killingworth. Trin. 13 Will. III. B. R.

H Covenants at two Days Notice to accept 1000 l. Stock at any Time within twelve Months, and to pay 2000 l. on the Transfer; and the Plaintiff shews, That on the second Day of November he gave the Defendant Notice he would be at the Place the Fourth, and that he was there, & obtulit, and that the Defendant was there. Per Cur, When both Parties meet at the Time and Place, he that pleads a Tender must also plead a Refusal; otherwise such a Plea is naught on Demurrer, but good after Verdict; and if the Defendant be absent, he must shew that, and also that he was at the Time and Place, and tendered. Vide Sid. 31. 17 02 7 E. 3. 11. 2 Saund. 350. Peters and Opie.

(3.)
When both Parties meet, Refusal must be shewn.
1 Saund. 320.
2 Saund. 350.
Lutw. 368.
S. C. 3 Salk. 342.
Cases B. R. 529.

If one comes
nor, the
Pleader
must shew
when he
came, and
how long he
staid.

Must stay till
Sun-set un-
less special
Circumstan-
ces shewn
vary it.
Vide 2 Inst.
107.
8 Co. 147.

2dly, He that pleads a Tender at the Time and Place and one there to receive, must shew at what Time of the Day he was there, and how long he staid; for he ought to shew that he had done all that could be done on his Part to accomplish what by his Agreement he was bound to do. 6 Co. 114. Yelv. 3.

3dly, The last Part of the Day is the Time the Law appoints for a Tender, but it must be Time enough before Sun-set for transacting the Matter which is tendered: Yet in the Case of Bar, wherein there could be no Transfer, but at the Hours of the Company, i. e. from ten to twelve, &c. the Plaintiff must aver the Usage of the Company, and shew that he came accordingly and stayed so long.

Ante 514.
Post 650.
1 Lev. 176,
196.

Term-time, and Computation.

Anonymus. Mich. 10 Will. III. B. R.

(1.) **P**ER Holt C. J. Mr. Justice Twysden used to cite the Book of E. 4. and say, they were to hear no Law the last Day of a Term.

Asmole *versus* Serjeant Goodwin. Trin. 11 W. III. B. R.

(2.)
Sundays and
Holidays
computed
for Acts to
be done out
of Court.
Vide Post
Pl. 6.
6 Mod. 252.

CASE against the Custos Brevium, the Declaration was delivered on Friday Morning and Rules given to plead within four Days, whereas Saturday and Sunday were not juridical Days. Et per Cur', We reckon them non juridici as to Matters to be transacted in Court, and therefore Sundays and Holidays are no Days to move in Arrest of Judgment. But as to Business done out of Court, as Rules to plead within four Days &c. Sundays are reckoned the same with other Days.

Sir Robert Howard's *Case*. Trin. 11 Will. III. B. R.
At the Sittings at Guildhall.

A Policy of Assurance was made to insure the Life of Sir Robert Howard for one Year, from the Day of the Date thereof; the Policy was dated on the 3d Day of September 1697. Sir Robert died on the 3d Day of September 1698. about one a Clock in the Morning. Et per Holt C. J. in an Action hereupon it was ruled at the Sittings at Guild-Hall, 1st, That from the Day of the Date excludes the Day, but from the Date includes it, so that the Day of the Date is excluded. 2dly, That the Law makes no Fraction in a Day, yet in this Case he dying after the Commencement, and before the End of the last Day, the Insurer is liable, because the Insurance is for a Year, and the Year is not complete till the Day be over: Yet if A. be born on the third Day of September, and on the second Day of September twenty-one Years afterwards he makes his Will, this is a good Will; for the Law will make no Fraction of a Day, and by Consequence was of Age.

(3.)
Insurance of
H.'s Life for
a Year. H.
died on the
last Day; In-
surer liable
Vid. ante
413.
3 Lev. 438.
5 Co. 1, 94.
100.
2 Bull. 83,
305.
S. C. Holt
195.

Allen *versus* Brookbank. Trin. 11 Will. III. B. R.

UPON a Libel in the Spiritual Court for Incontinency, the Citation was served on the Sunday, and fixed on the Church-door, and that was objected to be void, because it is a Process. Vide 22 Car. 2. Holt C. J. That Statute extends not to this Process, nor to Summons at the Church; but only to such Processes which may as well be executed at any other Time.

(4.)
Citation may
be serv'd by
fixing on the
Church-
Door on
Sunday.

Lord Bellamont's *Case*. Pasch. 12 Will. III. B. R.

THE Attorney General moved for a Trial at Bar last Paper-Day in the Term, in an Action against the Governor of New-York, for Matter done by him as Governor; and granted, because the King defended it.

(5.)
Trial at Bar
last Paper-
Day.
Post 651.

Christopher Hales *versus* Owen. Trin. 2 Ann. B. R.

SUNDAY is not included in the four Days to move in Arrest of Judgment, but the Defendant must have four judicial Days. Vide post 627. 6 Mod. 252. ante pl. 2.

(6.)
Sunday not
included in
the four Days
to move in
Arrest of
Judgment.

Parker

Parker *versus* Sir William Moor. Hill. 2 Ann. B. R.

(7.)
H. may be
taken on an
Escape War-
rant on Sun-
day.
S. C. 6 Mod.
95, 21, 22, 63, 96, 154, 254. 5 Mod. 95, 450. 3 Salk. 148.

ONE was taken on a Sunday by Virtue of an Escape Warrant, and it was held good; for one may take another on a Sunday upon fresh Pursuit, and this is in the Nature of a Writ, tho' it be by a new Method, for this is no original Process, but the Party is in still upon the old Commitment continued down.

S. C. 6 Mod.
148, 159, 196.
Holt 761.

Harvy *versus* Broad. Pasch. 3 Ann. B. R.

(8.)
Tres Trin.
on Sunday,
Writ of In-
quiry then
returnable,
executed
Monday;
Error.
1 Jon. 301.
Court takes
judicial No-
tice of Com-
putation of
Time.
Vid. 6 Mod.
41, 81, 148,
160, 252, &c.
1 Leon. 242.
& infra.
Mod. Cases
159. S. C.
2 Keb. 59.
1 Jon. 301.
Mod. Cases
41, 81, 160,
252.
Jon. 228.

A Writ of Enquiry was returnable tres Trin. which was on Sunday, and the Writ was executed on the 14th, and that was Monday, which was kept as the Effoin-Day, but was a Day after tres Trin. A Writ of Error was brought. Et per Cur',

1st, A Writ may be executed the Day it is returnable, but not after. 2dly, The Court may take Notice of this judicially, and there needs no Writ of Error, and no Assignment of this for Error on the Record. So 5 Co. 45. the Court took Notice that the Teste of the Writ of Covenant was after the Return. Vid. Co. Ent. 250. Mo. 571. and Plowden, Fish and Bocket's Case. the Court took Notice the Proclamation of a Fine was on Sunday. 3dly, There was no Difference between moveable and immoveable Feasts; for the moveable Calculation for Easter was made by the Council of Nice, but received in England and made Part of the Calendar, which is established by the Law of England: Therefore, whether the Feast be moveable or immoveable, or whether the Computation is by the Day of the Month, the Day of the Week, viz. Die Lunæ prox. post tres, &c. as in judicial Proceedings, we have the same Law and the same Rule, and the Court cannot but see and take Notice of what appears to them. Vide 1 Cro. 53. 1 Lev. 196. 1 Sid. 301. Plowden 265, 266. b. Ro. 524. Dy. 181. Pl. 52. 21 H. 6. 13. Pl. 4. 3 Cro. 227. Lat. 118. 2 Cro. 506, 548. 1 Jon. 301. Stat. de Anno B. sextili. Harvy *versus* Broad. The Judgment was reversed.

S. C. 6 Mod.
250, &c.
3 Salk. 246.

Davies *versus* Salter. Mich. 3 Ann. B. R.

(9.)
Same Point
1 Mod. 402.
2 Danv. 294.
6 Mod. 41,
81, 160, 196.

A Writ of Inquiry was returnable tres septiman. Trin. which was Sunday the 13th of June, and the Writ appeared and was executed the 14th Day of June. Judgment pro quer', and Error brought; and Eyre urged, That the Court could not take Notice of the Days of the Month. 1 Cro. 275. Yelv. 141.

Ro. Abr. 595. Sed non allocatur; thus he urged, That Sunday
ought not to be reckoned, but Monday in Lieu of it. Vide Br. c. 5.
Cro. 16. 1 Cro. 11. Et per Holt C. J. If Sunday happen to
be the 4th die Post, the Holding of the Term must of Necessity
be over till Monday. So if Sunday happens to be the Effoin-
Day: And as to the Relation of Judgment, where the Effoin-
Day is a Sunday, the Judgment can only relate to the first judi-
cial Day. All Quinden. Octab. &c. are inclusive: Here we enter
the Lunæ, &c. and that is inclusive: In C. B. they enter a die Ante 413,
Lunæ, &c. and yet that is inclusive too: But in the principal 625.
Case there is no Necessity; the Writ might have been executed
on the 1st, or returned at another Day.

1 Jon. 300.
1 Danv. 683.
2 Danv. 254.
6 Mod. 41.
81, 160, 196.
1 Inst. 135.

T R A V E R S E.

Vide Lutw.
107, 108,
1359
2 Cro. 221.
1 Saund. 32.
Raym. 4067.

Young *versus* Rudd. Mich. 7 Will. III. B. R.

ASSUMPSIT and Quantum meruit: The Defendant
pleaded he gave the Plaintiff a Beaver-hat in Satis-
faction of the Promises, and the Plaintiff accepted it
in Satisfaction: The Plaintiff, Protestando That he
not give it in Satisfaction, traverses, That he accepted it
in Satisfaction; to which it was demurred. 1st, It was urged,
that this could not be pleaded in Satisfaction of the Promises,
should have been of the Damages, like Neal's Case, Yel. 192.
Debt upon an Obligation, the Defendant pleaded a Load of
given in Satisfaction of the Obligation, and it was held no
Bar; for it ought to be pleaded in Bar of the Money due by the
Condition. Sed per Cur', A Release of the Condition would
have been no Bar to Debt on the Obligation; but a Release of
the Promise in the Case at Bar had been a good Plea. 2dly, It
was urged, That this Traverse was naught; for if the Gift in
Satisfaction be admitted, his Acceptance will not be material.
per Holt C. J. The Acceptance is material as well as the
Gift; to plead a Gift without shewing the other received it,
would be naught; either is traversable. Vide Hob. 178. Et per
Vol. II.

(1.)
Assumpsit,
Satisfaction
pleaded; Issue
taken upon
the Accep-
tance, good.
5 Mod. 86.
S. C. call'd
Young *versus*
Rudd.
Carth. S. C.
347. call'd
Young *versus*
Rudd.
5 Rep. Pan-
nell's Case.
Mo. 677,
678.
Sty. 239.
9 Co. 79.
Cro. El. 68,
193.
Comb. 346.
Cases B. R.
85.

F f

Roke-

Rokeby J. The Gift is neither admitted nor confessed in this by the Plaintiff, because there is a Protestando to the Gift; that it doth not appear here was any Receipt at all.

Pullen *versus* Benson. Mich. 10 Will. III. B. R.

(2.)
Non antea
held no Tra-
verse where
further Mat-
ter must be
disclosed be-
fore he can
conclude to
the Country.
Cro. El. 439,
443.
1 Leon. 95.
Cal. 123.
S. C. Cases
B. R. 264.
Holt 558.

IN Debt on a Bond, the Plaintiff declared, quod Def. 20 Novembr. concessit se teneri, &c. & profert in Cur. scriptum pradiet. geren. dat. eisdem die & anno. Defendant pleads, that it was first delivered 30 die Novembr. & non antea, and sheweth the Writ, on which he was in Custody, was returnable quinquaginta Martini, so that the Bond was taken after the Return of the Writ; and then relies on the Statute of H. 6. The Plaintiff demurred and had Judgment; and the Court agreed, That the Matter of Supposal is not traversable, no more is Matter alleged out of due Time, no more is Matter immaterially alleged. But they held the 20th Day of November an express Allegation, and that the Defendant's Plea had made it material; for the Validity of the Bond turned wholly upon the Day of the Delivery upon which Reason the Defendant should have traversed its Validity on the 20th. And the Court held the non antea was no Traverse, because 'tis that which cannot be rested upon; but the Party must disclose farther Matter before he comes to conclude. See Yelv. 138. 2 Cro. 263. 5 H. 7. 26. 2 Keb. 108. 1 Sid. Yelv. 31. But Holt C. J. said, That that Case of H. 7. did not up to this Case.

2 Mod. 68. Chance *versus* Weeden. Mich. 13 Will. III. B. R.

(3.)
De injuria
sua propria
is a good Re-
plication to a
Justification
by the Com-
mon Law or
general Sta-
tute.
Vide 1 Lev.
307, 308.
2 Lev. 11, 12.
3 Lev. 41.
S. C. Holt
409.
Cases B. R.
580.

TRESPASS for 200 Bushels of Salt: The Defendant sheweth the Act for laying a Duty on Salt 10 W. 3. that it was put on Board to be exported, not being weighed, &c. and that he was an Officer, &c. and seized it; the Plaintiff replied De injuria sua propria absque tali causa; The Defendant demurred. per Holt C. J. Where the Defendant justifies by Virtue of Authority by the Common Law, as a Constable by Arresting of the Peace, under Process of the Admiralty, &c. De injuria sua propria is a good Replication; so it is, and by the same Reason, when one justifies by an Authority of an Act of Parliament; for being a general Law, the Statute can be no Part of the Issue. Vide 16 H. 7. 2. 5 H. 7. 6. Co. Ent. 643. A Justification upon the Statute de malefactoribus in parvis, and a Replication: As for the Case in Crogat's Case of Waste, and after per View, Holt C. J. said it stood on a particular Reason. Also the Court held the Plea ill, because it was not shewed

Sort of Salt this was, Bay-salt, Pit-salt, White-salt, &c. for the Statute does not extend to all. Judgment pro quer'.

Haywood *versus* Davies & al'. Mich. 1 Ann. B. R. (4.)
Vide this Case, Title Abatement, Pl. 10. pag. 4.

WHERE a Traverse ought to conclude to the Country, and where with an Averment.

White *versus* Bodinam. Pasch. 3 Ann. B. R.

LESSEE for Pears brings Covenant against the Lessor, declaring upon a Demise and Covenant for quiet Enjoyment, and assigns for Breach, that the Lessor did enter upon him and oust him of the Premises: The Defendant pleads, That he entered to distrain for Rent-arrear, absque hoc, that he ousted him de premisis. To which the Plaintiff demurred, thinking the Traverse ill; because if he ousted him of any Part of the Premises, he had a good Cause of Action, therefore he should have traversed, absq; hoc, that he ousted him of the Premises, or of any Part thereof. But per Cur', The Plea is well enough in this Case; for if the Plaintiff will join Issue upon the Matter of the Traverse, and prove the Ouster of any Part, the Issue shall be for him: And the Court took a Diversity between pleading the general Issue, as in Debt, you must plead Non debet nec aliquam inde parcellam, and a special Issue, as this is. 3 Cro. 83, 84. Over 115. Judgment for the Defendant.

(5.)
Absque hoc, that he ousted him de premisis goes to every Parr.
Vide 2 Mod. 68.
3 Lev. 115, 227.
2 Co. 1.
8 Co. 91.
Vaugh. 175.
3 Cro. 914.
2 Saund. 177.
1 Inst. 282.
Yelv. 30.
1 Lutw. 317.
Hob. 53.
1 Vent. 272.
S. C. 6 Mod. 150.

Gilbert *versus* Parker. Pasch. 3 Ann. B. R.

Lutw. 1624, 1625.
Quar. 6 Co. 24.

IN Replevin for taking Cattle, the Defendant made Conusance, that A. his Master was seised of the locus in quo, and per praecept. he took them Damage-feasant: Plaintiff replied, that he was seised of one third Part, and put in his Cattle, absq; hoc, that the said A. was sole seised: To this the Defendant demurred, and Judgment was given against him; for the Defendant makes a Conusance under his Master as sole seised, when he is only Tenant in Common; in which Case he should have pleaded according to the Truth, that he was only Tenant in Common, &c. When the Defendant pleads his Master was seised in Fee the Place where, &c. that must necessarily be understood that he is sole seised; and whatever is necessarily understood, intended and implied, is traversable as much as if it were expressed; and therefore, tho' a Seisin in Fee is only alledged generally, yet that

(6.)
Upon pleading a Seisin generally, Traverse maybe taken that he is sole seised.
Vid. ante 562.
5 Mod. 150.
Cro. El. 372.
2 Saund. 295.
9 Co. 66, 112.
Mod. Caf. 158, S. C.

being intended a sole Seisin, the Plaintiff may traverse, absq; hoc, that he is sole seised; since the Plaintiff makes himself Tenant in Common with the Defendant, it had not been enough to say, that he is Tenant in Common, without traversing the sole Seisin.

8 Co. 89.
Lutw. 1177,
1316.
Ante 580,
583.
3 Lev. 104.

2dly, The Court held he might either traverse, absq; hoc, that he was sole seised, or that he was seised modo & forme. Hob. 119. 3 Cro. 795. Winch 7. 2 Mod. 6. Dyer 280. of which the Court doubted, but said there might be Difference between Parceners and Tenants in Common who are seised per my per tout. Vide 1 E. 4. 9. 2 Vent. 228. Hutt. 120. Hob. 72. M. 863. 37 H. 6. 31. Kel. 27. 1 Leon. 78. 32 H. 6. 2. 6. 21 E. 4. 6.

See 1 Hawk.
P. C. cap 17.
Hale's P. C.
10, 11, &c.
Kely. Rep.
2, 3, 4, &c.

T R E A S O N.

Rex & Regina *versus* Geary. Mich. 1 W. & M. B.

(1.)
Attainder of
Treason re-
versed for
want of an
Allocutus be-
fore Judg-
ment.
Vid. ante 576.
S. C. 1 Show,
131.

GEARY was attainted of High Treason on an Indictment, to which he pleaded Guilty. Upon a Writ of Error brought to reverse this Attainder, the Exception taken was, That it did not appear he was asked what he had to say, why Judgment should not be given against him; and all the Precedents are with an allocutus quid, or quid pro se dicere habeat, &c. Vide Plowd. 387. Co. Ent. 5. Rast. 455. And the Court held the Exception good, for he might have Matter to move in Arrest of Judgment, or a Pardon; and the Attainder was reversed.

S. C. Show.
P. C. 186.
& vid. ib.
127 &c.
post 632.

Tucker's Case. Pasch. 5 & 6 W. & M. B. R.

(2.)
Judgment in
Treason re-
versed for
Want of the
Words con-

tra ligeantiae suae debitum in the Indictment. 3 Lev. 396. 4 Mod. 162. Comb. 257. Skin. 360, 425, 442. Carth. 317. Cases B. R. 51. Holt 678.

REGINALD TUCKER brought a Writ of Error to reverse an Attainder of High Treason, upon an Indictment against him for the Rebellion in Monmouth's Time: The Indictment was, That the Defendant and another, Ligeantiae suae de-

tum minime ponderan', did traiterously wage War against the King verum & naturalem Dominum suum contra pacem, &c.

It was held, 1st, That the Want of the Words, contra Ligeantiae suae debitum, supposing them to be necessary, were not supplied by the first Words, Ligeantiae suae debitum minime ponderan', &c. for a Man may not consider his Duty, and yet may not at all offend against it: And contra Ligeum supremum Dominum suum, are not now necessary, nor were they anciently used. These do not positively express, but imply only, That the Defendant acted against his Allegiance; and Indictments shall not be made good by Intendments.

2dly, Without the Duty of Allegiance there can be no Treason, therefore an Alien Enemy cannot commit Treason; an Alien Army being here may: That for Want therefore of these Words, the Crime wants a due Description.

'Tis true, some Precedents of Indictments want the Words Contra Ligeantiae suae debitum. But to these the Chief Justice said, They were Cases of Treason made by particular Acts of Parliament, and not where the Fact was Treason in its Nature; and that in such Case 'twas sufficient if the Indictment pursued the Words of the Statute, and concluded contra formam Statuti, without concluding contra ligeantiae suae debitum. The Attainder was reversed.

3 Lev. 396.
4 Mod. 162.

Post 633.
3 Inst. 11.
Hob. 271.
Co. Lit. 129.
Calvin's
Case, 6, 7.
Carth. 317.

Indictments
not to be sup-
plied by In-
tendment.

See 2 Hawk.
P. C. 224,
to 256. what
Certainty
necessary in
Indictments.

Dyer 155.
1 Inst. 129.
3 Inst. 11.

Vid. 2 Hawk.
P. C. 252.

Charnock's Case. 7 Will. III. At the Old-Baily.

Vid. 1 Hawk.
P. C. cap. 17.
See 32, 33,

THE Question was at the Trial, Whether Words could be an Overt Act of Treason in compassing the Death of the King? For Hale, Placit. Coron. 13. says, Words are not an Overt-Act of Treason, unless set down in Writing. Et per Holt C. J. Loose Words spoken without Relation to any Act or Project, are not Treason: But Words of Persuasion to kill the King are Overt Acts of High Treason; so is a Consulting how to kill the King; so if two Men agree together to kill the King; or the bare Imagination and Compassing makes the Treason, and any external Act that is a sufficient Manifestation of that Compassing and Imagining, is an Overt-Act: It was never yet doubted, but to meet and consult how to kill the King, was an Overt-Act of High Treason. Vide Cro. Car. 117.

(3.)
Words of
Persuasion
or Consulta-
tion, an O-
vert-Act of
Treason in
Compassing
the King's
Death.
Vid. Cro Car.
125, & 332,
333.
S. C. Ante
288.
3 Salk. 81.
Holt 133,
301, 681.

S. C. Parl. Dominus Rex *versus* Walcot. Trin. 7 Will. III. B. R.
 Caf. 127, &c.

(4.)
 Judgment in
 Treason re-
 versed for
 Want of the
 Words ipso
 vivente, or in
 conspectu e-
 jus, as to
 burning the
 Bowels.
 Vide Parl.
 Caf. 127, &c.
 & 186, &c.
 Ante 630.
 3 Lev. 396.
 4 Mod. 162,
 395.
 Carth. 348.
 S. C.
 Staund. 182.
 3 Inst. 211.
 Comb. 369.
 Cases B. R.
 95.
 Holt 680.
 3 S. T. 600.
 6 S. T. Ap.
 42.

Record of
 Judgment in
 Treason re-
 fused to be
 amended by
 the Minutes
 of the Court
 of Old Baily.
 Vid. 2 Hawk.
 P. C. 247.

WRIT of Error to reverse a Judgment against the Defen-
 dant in an Indictment of High Treason: The Judg-
 ment was, Quod interiora extra ventrem trahentur; but the
 Words, in conspectu ejus & ipso vivente comburentur, were
 omitted: It was agreed, That if this be a necessary Part
 of the Judgment and omitted, the Judgment is erroneous; for the
 Judgment, in capital Cases especially, is stated, and not arbi-
 trary; and 'twas held that this was a necessary Part; for the
 Death is the Ultimum supplicium, yet Death inflicted one Way
 is more severe than another, and more formidable; and if the
 Judgment be right, all other Judgments are wrong; for all others
 have these Words, viz. In conspectu, &c. Vide 1 H. 7. 24. B.
 Coron. 121. Stow's Annals 513. Plowd. 387. Rast. 545. Staund.
 128. Co. Ent. 422, 423. Harrison, one of the Regicides, rose
 up and struck his Executioner after his Bowels were cut out,
 which shews the Thing is not impossible, tho' that be not ne-
 cessary material: At another Day 'twas insisted, That the Record below
 was right on an Affidavit, that swore, That the Words ipso vi-
 vente were in the Record below, and therefore it was prayed
 That the Clerk of the Peace might attend by Rule, which was
 granted; and upon his Attendance it appeared upon Examina-
 tion, That the Minutes of the Judgment taken and entered upon
 the Record of the Indictment had these Words in; but Mr. Tu-
 ner, Clerk of the Peace, said, That Sir Robert Sawyer, the
 Attorney General, after the Trial said, That Use was to be
 made of the Record in Ireland, and therefore examined it before
 it was transcribed, and then this Record which is now certified
 was entered at large; so that the Question was, Which was
 the Record? Et per Cur', That which was entered at large is the
 Record: Then the Counsel moved it might be amended by the
 Minutes: And Holt C. J. said, That if it were amendable, they
 could not amend it here; for if a Record in C. B. be erroneous
 we cannot amend it here; but upon Diminution alledged here
 we grant a Certiorari; but there can be no Diminution alledged
 at the Old-Baily.

2dly, He questioned much if it were at all amendable, and cited
 Sampson's Case, Jones 421. where the Court were divided, and
 'tis there said by Kelynge, That there were no Precedents of such
 Amendments: And after the Case had been argued several
 Times at the Bar, upon the Matter in Law, the Court, Trin.
 8 W. 3. unanimously, upon solemn Arguments, reversed the
 Judgment, for want of the Words, ipso vivente, or in conspectu
 ejus.

Cranburn's Case. Pasch. 8 Will. III. B. R.

CRANBURN, a natural-born Subject of England, was indicted of High Treason contra Ligeantia suæ debitum. It was objected, That it ought to be naturalis Ligeantia suæ debitum, or contra supremum naturalem Dominum suum, to distinguish it from that which is local Allegiance; for there are two Sorts of Allegiance; a natural Allegiance, as that of Subjects; and a local Allegiance, as that of Strangers residing here; and this is the Allegiance in the Indictment mentioned. Sed per Curiam, If an Alien be indicted for Treason contra naturalem Dominum suum, or naturalis Ligeantia suæ debitum, the Defendant may give in Evidence that he is an Alien; for the Indictment is restrained to that Species of Allegiance which is not due; but a Subject may be indicted so, or contra Ligeantia suæ debitum; for Allegiance is the Genus, which being set forth, all Species are comprised under it.

The Indictment was, That at such a Time and Place proditorie tractaverunt proposuerunt & consultaverunt de viis & modis quomodo Dominum Regem interficerent & consenserunt & agreeaverunt quod quadragint. homines equestres should be provided, &c. for that End.

It was objected, That here are two distinct Acts of High Treason, and the latter is not laid to be done proditorie. Sed non allocatur; for by Mr. Cowper, the Et makes the whole but as one Sentence; at least it conveys the Force of the Words in the former Sentence to this, and makes it partake of them. Et per Holt C. J. there is but one Treason alledged, viz. Compassing the Death of the King, and that is said to be proditorie; therefore it need not be repeated again in setting forth the Overt-Act; for the Overt-Act is not the Treason, but Evidence of the Treason. The Treason it self lies in Compassing, which is an Act of the Mind. Accordingly in the Case of the Regicides it was agreed, That the Indictment should not be for killing the King, but for Compassing and Imagining his Death, and that the Killing should be alledged as the Overt-Act; for by the Statute the Treason consists in the Intention. But if a distinct Treason, as that of levying War, had been alledged, where the Treason consists in the Act and not in the Intention, the Act must have been said to be done proditorie; for the Act of levying is a Treason, and not an Overt-Act of Treason or bare Matter of Evidence.

(5.) Subject indicted for Treason contra Ligeantia suæ debitum, well; otherwise if naturaliz'd, &c. in the Case of an Alien. Ante 631. 3 Inst. 5, 11. Hob. 271. Co. Lit. 129. S. C. Holt 686. 4 S. T. 686. 6 S. T. Ap. 56.

In Indictments for Compassing the King's Death, the Treason being first laid, the Overt-Act need not be laid proditorie. See 1 Hawk. P. C. 38, 39, &c.

Otherwise where the Treason consists in the Act.

Cook's Case. 8 Will. III. *At the Old-Baily.*

(6)
Copy of In-
dictment not
granted after
pleading.

IN the Indictment against Cook, after the Court was sat and the Jury called, but not sworn, Sir Bartholomew Shower of Counsel for the Prisoner made Objections to the Indictment, but it was held right enough; upon that he urged, That then he had not had a Copy, and the Prisoner could not be tried. Et per Cur', By the Words of the Act he is to demand it, and he has it to enable him to plead, and till then he is not to plead. In this Case he has pleaded; therefore this Benefit is waived, and the Prisoner has admitted he has a Copy, or did not think it for his Service to require it, but was able to plead without the help of it.

Vaughan's Case.

(7)
Indictment
for Treason
in levying
War, or ad-
hering to the
King's Enc-
mies gene-
rally, with-
out shewing
particular
Instances,
not good.
Vid. 1 Hawk.
P. C. 37, 38.
S. C. Holt
689.
5 S. T. 17.
6 S. T. Ap.
57.

THE Defendant was indicted for Treason, in adhering to the King's Enemies, cum pluribus subditis Gallicis inimicis Domini Regis, and that they did navigate a certain Vessel called Clancarty, with a Design to destroy the King's Ships. And it was held by Holt C. J. and the other Justices at the Trial, That an Indictment for levying War, or adhering to the King's Enemies generally, without shewing particular Acts or Instances, is not good; for the Words of the Statute are, And thereof be provably attainted by some Overt-Deed, which comes after the Particulars of Compassing the King's Death, levying War, and adhering to the King's Enemies; and it would be Violence to restrain them to the first Article only without Regard to the last, to which they are equally connected; if they are to be restrained to a single Article, it ought rather to be referred to the Article of adhering only.

And if it be not a good Indictment without special Acts, &c. the Question is, Whether those that are alledged ought not to be proved, and no others? Et per Holt C. J. A distinct Overt-Act cannot be given in Evidence, unless it relate to that which is alledged, or conduces to the Proof of it. But if it conduce to prove an Overt-Act alledged, 'tis good Evidence; as if Consulting to kill the King be alledged, any Actings or Doings in Pursuance of that Consultation may be proved; for it proves their Agreement and Consent, and is a farther Manifestation of the Act alledged in the Indictment.

It was also objected, That in Evidence the Seamen must appear to be French-men born; for if they were Dutch, they are not subditi Gallici.

2dly, That tho' he was said to adhere to the King's Enemies, yet it was not said to be against the King.

3dly, That this was not a sufficient Act of adhering, without fighting, or some Act of Hostility. Et per Cur',

1st, If the States be in Alliance, and the French at War with us, and certain Dutch-men turn Rebels to the States, and fight under Command of the French King, they are Inimici to us, and Gallici Subditi: For the French Subjection makes them French Subjects in Respect of all other Nations but their own; and if they cruise at Sea, and an English-man assist them, he is a Traitor, but not a Pirate, for none are Pirates that Act under the Command of a Sovereign Prince.

Joining with Rebels Subjects of the King's Ally, fighting under the Command of an Enemy Prince, is Treason in adhering, &c.

2dly, Adhering to the King's Enemies must of Necessity be against the King; and therefore if an English-man assist the French, being at War with us, and fight against the King of Spain, who is an Ally of the King of England, this is Treason, as adhering to the King's Enemies against the King; for the King's Enemies are hereby strengthened and encouraged, and so within the express Words of 25 E. 3. of adhering to the King's Enemies; and it is sufficient to alledge the Treason in the Words of the Statute.

Tho' the fighting be directly against an Ally. Vid. 1 Hawk. P. C. 37, 38.

3dly, Cruising is a sufficient Overt-Act of Adhering, Comforting and Aiding; as if English-men would list themselves and march, this is sufficient without coming to Battle, and there may be levying War without actual Fighting. Vide Vaughan's Trial.

Cruising is a sufficient Overt-Act.

See Raym. 367. That an Indictment for High Treason may be laid by Nisi Prius.

TRESPASS.

Inclendon *versus* Burges. Mich. 1 W & M. B. R. In
Mich. 4 Jac. 2. Rot. 282.

(1.)
Contra pa-
cem is Sub-
stance.
Vid. post. 641.
Cro. Jac. 527.
1 Hawk. 244.
2 Hawk. 243.
6 Mod. 128.
4 Mod. 145.
1 Salk. 67.
Yelv. 66.
Vid. 1 Sid. 253. 2 Cro. 377. 2 Vent. 49. Show. 27. Comber. 166. S. C. Charth. 65. Holt 342.

TRESPASS for Breaking, Entering, and Depasturing
36 Car. 2. continuando the Depasturing till 4 Jac.
contra Pacem Domini Regis nunc, which was R. Jam
the Second. This was held naught, for then there
no contra Pacem to the Trespass tempore Caroli secundi, but
is omitted, and contra Pacem is Substance. Vide Cro. Car. 3
Cro. Jac. 426, 443, 537.

Hore *versus* Chapman. . . . 1 W. & M. B. R.

(2.)
Declaration
in Trespass,
Quare vi &
armis, &c. ill.
See 2 Lev.
206.
2 Jon. 197.

IN Trespass the Plaintiff declared, Quare vi & armis clausi
fregit, and after Verdict for the Plaintiff, Judgment was
arrested, for quare is not positive but interrogatory, and more
worse than quod cum. Vide 1 Cro. 420. 2 Cro. 47. 2 Bulst. 2
Godb. 251. 2 Keb. 400. 1 Sid. 326. 3 Cro. 57. 1 Keb. 377.
2 Show. Cas. 17, 180, 294. Con. 413.

Wildgoose *versus* Kellaway. Trin. 3 W. & M. B.
Rot. 268.

(3.)
Declaration
in Trespass
without vi &
armis, ill on a
general De-
murrer.
Vid. 1 Hawk.
245, 149, 150.
2 Hawk. 241,
242.

TRESPASS for breaking his house and taking away
Dishes; the Defendant justified under a By-Law,
that being ill, the Plaintiff demurred; but the Defendant
Exception to the Declaration, because it wanted the Words
& Armis; and the Court held it naught on a general Demur-
being an Omission of the Substance; for it alters the In-
ment from a Capiatur to a Misericordia. Item, It belongs
the Jurisdiction of the County Court, if it be a Trespass
out Vi & Armis.

Smith *versus* Kemp. Trin. 4 W. & M. B. R.

S. C. 4 Mod.
186.
Skin. 342.
Holt 322.

TRESPASS Vi & Armis, for taking Fishes ex libera Piscaria sua. Upon Not guilty pleaded, and Verdict for the Plaintiff, 'twas moved in Arrest of Judgment by Carthew, That he that had libera Piscaria, could not maintain Trespass; and compared it to the Case of a Commoner, who could not bring Trespass for a Trespass done in the Common: That libera Piscaria was not like libera Warrena, for he did allow that he who had libera Warrena might have Trespass against any one but the Owner of the Soil, for hunting in his free Warren. 2 Ro. Rep. 55. 111. because libera Warrena was a Liberty to hunt in one's own or another's Ground, exclusive of all others; and that this was granted by the King, who is Master of all Games; But libera Piscaria was only a Freedom of Fishing with others, and the same with Communis Piscaria; and for this he cited 1 Inst. 122. and that such a Grantee had only a Liberty to take Fish, and no Property in them, until taken; and so prayed that Judgment might be arrested.

(4.)
Trespass lies for Fishing in libera Piscaria, and taking his Fish. Comber. 11, 433, 464.
4 Mod. 186.
Carth. 285.
S. C.
H. who hath free Warren, may bring Trespass against any, but the Owner of the Soil, for hunting there.
6 Mod. 183.
2 Keb. 178.
3 Mod. 97.

Holt C. J. cited and relied upon the Reg. 95. in Point, where there is the same Writ, and likewise in F. N. B. 15. G. H. 43 E. 11. 6. and said there were three Sorts of Fisheries. 1. Separalis Piscaria, and there, he who had the Fishery, was Owner of the Soil, and therefore 'tis a good Plea in an Action brought by him, that it is liberum tenementum of another. 2dly, Libera Piscaria, which is where the Right of Fishing is granted to the Grantee, and such a Grantee hath a Property in the Fish, and may bring a possessory Action for them, without making any Title. 3dly, Communis Piscaria, and this was to be resembled to the Case of other Common; and disallowed the Authority of 1 Inst. 122. Eyre Justice said, That he took 1 Inst. 122. to be Law, and that many Judgments and Precedents were founded upon that Case, and that Libera, ex vi termini, did imply Common, which the Chief Justice and Dolben denied in Defence of the Register. Et nota dict. fuit per Carthew in this Case, That there were several Writs there against Law, particularly R. 105. Trespass per Baron and Feme for assaulting the Wife, and taking the Goods of the Husband.

H. having libera Piscaria hath Property in the Fish, and Co. Lit. 122, denied. Vide ante 556.
11 Co. 17, &c.
Cro. Car. 553, 554.

Gibbon *versus* Pepper. Pasch. 7 Will. III. B. R.

In Trespass and Assault, &c. The Defendant pleaded that he was riding a Horse in the King's Highway, and that his Horse being frightened ran away with him, and that the Plaintiff Vol. II.

G g 2

(5.)
Justification must confess the Trespass. and S. C. 4 Mod. 404.

2 Lev. 179.
4 Mod. 404.
S. C.
Sryl. 72.
1 Vent. 295.
2 Jo. 205.
3 Lev. 37.
1 Saund. 3.
Hob. 134.
Rol. Abr.
548.

and others were called to, to go out of the Way, and did not and the Horse ran upon the Plaintiff against his Will, &c. The Plaintiff demurred and had Judgment; not but if the Defendant had pleaded Not guilty, this Matter might have acquitted him upon Evidence; but the Reason of their Judgment was, because the Defendant justified a Trespass, and does not confess it; for if A. beats my Horse, by which he runs on another, A. is the Trespasser, and the Rider is not. And as to Hob. 134. Mo. 86 Placito 1192. 1 Brownl. Precedents 188. they differ, for in them Battery is confessed.

Ashmead *versus* Ranger. Will. III. B. R.

(6.)
Trespass by
Lessee of a
Copyholder
for Life, for
cutting down
by the Lord
of the Ma-
nor, held
maintainable
in B. R. and
affirm'd in
Cam. Scacc.
but reversed
by the Lords.
S. C. Cases
B. R. 378.
Holt 162.

TRESPASS was brought by Lessee of a Copyholder for Life, for breaking his Close and cutting down his Trees; the Defendant justified as Servant to the Earl of Kent Lord of the Manor: The Plaintiff replied, That the Copyholder was Tenant for Life, his House in Decay, and that the Trees growing on the Land were not sufficient to repair, &c. Upon Demurrer Holt C. J. held, That 3 Cro. 5. was not Law and that the Copyholder was Tenant of the Trees as much as of the Land; that the Fruit and the Acorns belonged to the Tenant; and he held, That if H. has all the Thorns in such Place for Estovers, he may maintain Trespass against any one that cuts them, even his Grantor, and in such Case need never that he burnt them. But where H. hath only Estovers to be taken in such a Wood or Place, and the Grantor cuts the Whole, the Grantee may maintain Case against the Grantor, but not Trespass Vi & Armis; and the whole Court held the Right was well maintained by the possessory Right which the Plaintiff had: The Judgment was affirmed in Cam. Scacc. but reversed in the House of Lords; for the Tenant could not cut the Trees and if the Lord could not, they must rot on the Land; for the no Body could.

S. C. 6 Mod.
38.
Holt 697.

Monkton *versus* Pashley. Hill. 1 Ann. B. R.

(7.)
Trespass for
entering his
Close and
Hunting, laid
with a Conti-
nuando, and
held well.
Vide post pl.
8.
2 Mod. 253.
3 Salk. 359.

TRESPASS for entering his Close and Hunting such a Day continuando transgr. præd. quoad the Hunting, divers diebus & vicibus, from the Day of the Trespass alledged to such a Day. Salkeld urged that this appeared not to be continued; that some Acts were permanent without Intermission Repetition, which properly lie in Continuance, others not.

2dly, That some Acts terminate in themselves and cannot be repeated, as killing a Dog, when once done it cannot be done again; therefore this cannot be laid with a Continuando. Vide 1 Lev. 210. 2 Ro. Abr. 549. And as to repeatable Acts, where-ever the first Trespass is without an Duffer, there every several Entry is a distinct Trespass and a new Trespass, and not a Continuance of the first; for a Release of the first would not discharge the second. Vide Cro. Jac. 107. Yelv. 126. [which Holt C. J. denied; for the Continuance must be answered as well as the first Act.] But where the first Entry is with an Duffer, there every other Act or Entry during the Duffer is but a Continuance of the first Trespass, and a Release of the first discharges all. Vide 1 Brownl. 223. Cro. Eliz. 210. 1 Lev. 210. compared with 1 Sid. 319. and so is F. N. B. 91. b. to be intended. So is 20 H. 7. 3. Ric. 3. 15. 21 H. 8. 43. Holt C. J. held, That of Acts that terminate in themselves, and once done, cannot be done again, there can be no Continuando, as hunting and killing a Hare or five Hares, but that ought to be alledged, That diversis diebus & vicibus inter such a Day and such a Day, he killed five Hares, or cut and carried twenty Trees: And where a Trespass is laid in Continuance, that cannot be continued, Except it ought to be taken at the Trial, for he ought to recover but for one Trespass: The Court held, That hunting might be continued as well as Spoiling and Consuming his Grass, or Cutting his Grass; and as to the Case of an Entry and Duffer the Court held, That the Plaintiff being ousted and having made a Re-entry, might bring Trespass, and declare that he entered such a Day, continuando, &c. or that he entered such a Day & diversis diebus & vicibus between such a Day and such a Day. And the Plaintiff had Judgment.

5 Mod. 178.
1 Sid. 319.
6 Mod. 39.
1 Lev. 210.
1 Vent. 363.
224, 249.
2 Rol. Abr.
549.
2 Mod. 253.
Yelv. 126.
Raym. 396.

Acts that being once done cannot be repeated, cannot be laid with a Continuando.
Comb. 193, 377, 427, 433.
Farell. 152.
5 Mod. 178.

Brook *versus* Bishopp. Hill. 1 Ann. B. R.

Comb. 426, 427.

TRESPASS Quare Vi & Armis the Defendant on the 2d of April broke and entered his Close, and trod down his Trees, nec non arbores suas, viz. 10 Populos & subboscum suum & 10 carectatas subbosci succidit cepit & asportavit transgressi-
es præd. usq; 27 Aprilis diversis diebus & vicibus continuando; and after Verdict and intire Damages, it was resolved, 1st, That Continuance, as to the Poplars and Underwoods, was im-
possible; and could not be.
2dly, That no Part of the Damages shall be intended to be given for that, but shall be applied to such Trespases as may be continued, according to 1 Vent. 363. Continuando transg. præd. generally, shall only refer to so much as lies in Continuance; but if it be continuando such and such Particulars, and they lie not in Continuance, it is naught after Verdict.

(8.)
Trespass in cutting down such a Number of Trees cannot be continued; but a general Continuando shall be applied to what may be continued after Verdict.
Vide ante Pl. 7.

Jocce

S. C. 6 Mod.
14.

Joce *versus* Mills. Trin. 2 Ann. B. R.

(9.)
Trespals
quare duos
Equos apud
D. in clauso
præd. invent.
existen. &
triticum de
bonis pro-
priis ipsius
A. &c. cepit,
does not
shew the
Property of
the Horses.

TRESPASS quare clausum suum apud D. fregit & duos equos apud D. præd. in clauso præd. invent. existen. &c. Centum congios tritici de bonis propriis ipsius adtunc & ibidem similiter invent. & existen. cepit & asportavit, &c. The Defendant pleaded Not guilty to all but the two Horses, and as to them a Distress for Rent; upon which it was demurred, the Issue being found for the Plaintiff and contingent Damages intirely given on the Demurrer: And now the Plea being held an ill Plea, Mr. Branthwayte moved in Arrest of Judgment, That the Horses were not laid to be the Goods of the Plaintiff; for that it did not follow that they were the Plaintiff's Horses, because found on the Plaintiff's Close. Vide 2 Cro. 46. Yelv. 36. Equum cepit a Persona sua. 2 Lev. 156. 3 Bulst. 303. Quod fuit concess. per Cur'.

Plea of tak-
ing by Dis-
tress for
Rent, does
not confess
Property.

2dly, It was urged and admitted, That the Plea did not confess a Property; for the Defendant might distrain the Goods of a Stranger for the Rent.

3dly, It was held, That the Copulative Et did not let it into the subsequent Part of the other Sentence, so as to make the Horses come under the de bonis propriis, like the Case in Raymond 395. Trespals for taking a Mare ipsius quer. nec non bonis & catalla sequent. not 2 Saund. 379. which Cases were allowed and the Reason is, because they are different Sentences, and the first is closed up by the Place being added: Pet Gould J. agreed the Case in 2 Ro. 250. Placito 7. For there by Virtue of the Copulative, the ipsius Querentis goes to all.

4thly, It was held the Plaintiff could have no Judgment, because the conditional Damages were intire, secus if several.

S. C. 1 Salk.
119.

Vid. Post. 642.

(10.)
2 Cro. 123.
Mod. Caf.
127, 145.

Russel *versus* Comb. Mich. 2 Ann. B. R.

WHERE Batter may be laid as Aggravation of Trespals for which alone Trespals lies not, vide this Case, Tit. Baron and Feme, Pl. 12. Pag. 119.

S. C. 6 Mod.
80.

(11.)
Trespals laid
in a former
King's Time,
contrapacem
of the pre-
sent, ill on
Demurrer,
but cur'd by
Verdict.

Day *versus* Muskert. Mich. 2 Ann. B. R.

TRESPASS quare Vi & Armis primo die Febr. Ann. Dom. 1701. Clausum suum fregit, and concludes contra pacem Dominae Annae nunc Reginae, &c. The Defendant pleads, That he and another did the Trespals jointly, and that the Plaintiff

relaxavit to the other. To that it was replied Non est factum; to which it was demurred, and Judgment pro Def. for King William died the 8th of March 1701, so it was contra pacem Regis, and not contra pacem Reginae; the Omission of contra pacem had been only Matter of Form, but here it is repugnant, for the Court must take Notice of the Demise of the King; that is the Description of the Trespass, and a Trespass done contra pacem Regis could not be given in Evidence: Indeed a Verdict would have aided it.

Cro. Jac. 527.
Yelv. 66.
Vide ante
636.
1 Hawk. 244.
2 Hawk. 243.
1 Sid. 253.
Carth. 65.
Comb. 166.

Green *versus* Goddard. . . . Ann. B. R.

TRESPASS, Assault and Battery laid on the first of October, 3 Reg. The Defendant as to the Vi & Armis pleaded Non cul. And as to the Residue says, That long before, viz. on the 13th of September, a Stranger's Bull had broke into his Close, that he was driving him out to put him in the Pound, and the Plaintiff came into the said Close, & manu forti impedit ipsum ac Taurum præd. rescussisse voluit, & quod ad præveniend. &c. ipse idem Defend. parvum flagellum super querentem molliter imposuit, quod est idem residuum, &c. absq; hoc quod cul. fuit ad aliquod tempus ante eundem 13 Diem. The Plaintiff demurred. Mr. Eyre for the Plaintiff argued, That they should have requested him to go out of the Close. 19 H. 6. 31. 11 H. 6. 23. 2 Ro. Tresp. 547, 548, 549. and that flagellum molliter imponere is repugnant. 1 Sid. 4. Lastly, The Traverse is short, and no Answer to the Time after. 1 Leon. 307. 3 Cro. 87. 1 Ro. Rep. 406. Et per Cur', There is a Force in Law, as in every Trespass quare clausum fregit: As if one enters into my Ground, in that Case the Owner must request him to depart before he can lay Hands on him to turn him out; for every Impositio manuum is an Assault and Battery, which cannot be justified upon the Account of breaking the Close in Law, without a Request. The other is an actual Force, as in Burglary, as Breaking open a Door or Gate; and in that Case it is lawful to oppose Force to Force; and if one breaks down the Gate, or comes into my Close Vi & Armis, I need not request him to be gone, but may lay Hands on him immediately, for it is but returning Violence with Violence: So if one comes forcibly and takes away my Goods, I may oppose him without any more ado, for there is no Time to make a Request.

2dly, Powell J. held, That the Attempt to take and rescue the Bull was an Assault on his Person, and a Taking from his Person; for if H. is driving Cattle on the Highway, and one comes and takes them from him, it is Robbery, which cannot be without a Taking from his Person; quod non fuit negatum. 19 H. 6. 66. 2 Ro. 549. Placito 11. 1 Ro. Rep. 19.

(12.)
Where in
entring H.'s
Close, there
is only Force
in Law, H.
cannot lay
Hands on the
Trespasser
before Re-
quest to de-
part; other-
wise where
there is a
Actual Force.
3 Salk. 308.
6 Mod. 227,
260.
2 Vent. 75.
1 Saund. 35.

Taking Cat-
tle from H. is
a Taking
from his Per-
son.

3dly,

Where Traverſe goes to the Matter, all before is Inducement and waiv'd; otherwiſe where to Time only.

3dly, They held the quod eſt idem reſiduum good without a Traverſe, and therefore no Traverſe was neceſſary; [Vide 1 Saund. 8.] and conſequently it is no Matter tho' it be ſhort, for here it goes only to the Time; where quod eſt idem abers it to be the ſame. Et per Holt C. J. Where a Traverſe goes to the Matter of a Plea, &c. all that went before becomes Inducement, and is waived by the Traverſe; but where a Traverſe goes to the Time only, what was ſet out in the Plea before, does not become bare Matter of Inducement, nor is it waived by the Traverſe. Sed adjournat. M^r. Eyre pro quer. M^r. Brydges pro Def.

Cockcroft *verſus* Smith. Paſch. 4 Ann. B. R.

(13.)
Son Affault
demeſne, a
good Plea in
Maihem
where the
firſt Affault
was violent.
S. C. 6 Mod.
230, 263.
Rep. A. Q.
43, 52.
Holt 699.

IN Treſpaſs for an Affault, Battery and Maihem, Defendant pleaded Son Affault demeſne, which was admitted to be a good Plea in Maihem: But the Queſtion was, What Affault was ſufficient to maintain ſuch a Plea in Maihem? Holt C. J. ſaid, That Wadham Wyndham J. would not allow it if it was an unequal Return; but the Practice had been otherwiſe, and was fit to be ſettled: That for every Affault he did not think it reaſonable a Man ſhould be banged with a Cudgel; that the Meaning of the Plea was, That he ſtruck in his own Defence: That if A. ſtrikes B. and B. ſtrikes again, and they cloſe immediately, and in the Scuffle B. maims A. that is Son Affault; but if upon a little Blow given by A. to B. B. gives him a Blow that maims him, that is not Son Affault demeſne. Powel J. agreed; For the Reaſon why Son Affault is a good Plea in Maihem, is, becauſe it might be ſuch an Affault as endangered the Defendant's Life.

Newman *verſus* Smith & al'. Trin. 5 Ann. B. R.

(14.)
Treſpaſs for
entring the
Plaintiff's
 Houſe and
Affaulting
him. Affault-
ing and me-
nacing his
Servants
may be laid
by Way of
Aggravation.
Vide ante
593, 594.
1 Salk. 119.
S. C. Holt
699, 700.

TRESPASS de eo quod the Defendants tiel jour & an apud W. upon the Plaintiff iſult. fecer. & ipſum verberaver', &c. Ita quod de vita, &c. & domum ipſius quer. apud W. præd. adtunc & ibidem freger. & intraver. & quer. in quiet. uſu & occupatione domus præd. turbaver. & impediver. necnon præd. quer. & filium ſuum & M. N. & R. N. filias præd. quer. & E. N. ſervam ſuam minas de verberatione eorum adtunc & ibidem impoſuer. & ipſos injuriis & gravaminibus, viz. iſult. & affraict adtunc & ibidem affecer. Et alia enormia, &c. Upon Mot granted it was found for the Plaintiff, and M^r. King moved in Arreſt of Judgment upon 2 Cro. 501. that the Maſter could not maintain Treſpaſs for beating his Servant or Children without ſpecial Damage, which ought to be ſpecially ſhewed: M^r. Eyre anſwered.

demurred, and so it was resolved, That the Action was for the Breaking and Entry, and the farther Description is only to shew the Court how enormous that Trespass was; and the Plaintiff could not recover Damages for losing the Service of his Children or Servant, nor could that be given in Evidence; because the Plaintiff might have a proper Action for that purpose: But the Circumstances mentioned might be proved in Evidence to aggravate Damages for the Defendant's Trespass by breaking and entering. And whereas it was said, *ibidem* refers to the Will, and it should be in *domo prædicta*, 'tis plain the adverb ties it to the same Time, and then it could not be at a different Place at the same Point of Time.

2 Cro. 123.
Mod. Cases
127, 149.

Layton *versus* Grindall. Pasch. 8 Ann. B. R.

TRESPASS for entering the Plaintiff's House and taking ^(15.) *separales claves pro apertione ostiorum domus præd.* Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was objected, that the taking of each Key was a distinct Trespass, and might require several Answers, and the Kind and Number ought to be ascertained. Vide Playter's Case, 5 Co. 34. 1 Vent. 53. 1 Vent. 262. But to this it was answered and resolved, That the Keys are sufficiently ascertained by Reference to the House. Vide Al. 2. Sty. 43. 1 Vent. 114. 2 Cro. 485.

Trespass for entering his House and taking several. claves pro apertione ostiorum domus, &c. good without shewing Number.

Anonymus. Pasch. 8 Ann. B. R.

TRESPASS for taking his Cattle: The Defendant pleaded ^(16.) that he was possessed of a Close for a Term of Years, and the Cattle trespassed therein, &c. The Plaintiff demurred, and Judgment was given for the Defendant, tho' he shew'd no Title, but justified upon a bare Possession: And this Difference was taken by Holt C. J. Where the Action is transitory, as Trespass for taking Goods, the Plaintiff is foreclosed to pretend a Right to the Place; nor can it be contested upon the Evidence, who had the Right; therefore Possession is Justification enough: But in Trespass *quare clausum fregit* it is otherwise, because there the Plaintiff claims the Close, and the Right may be contested.

Where the Trespass is transitory the Plaintiff cannot pretend a Right to the Place, therefore the Defendant may justify by Possession only.

T R I A L.

Vide 7 Co.
2, 3, 4, 7, &c.
9 Co. 30, 31,
32, &c.

1 Mod. 55.

Anonymus. Pasch. 5 W. & M. B. R.

(1.)
Trial at Bar.
Vid. ant. 625,
Post 648, 649.

A Cause cannot be tried at Bar where the Action is laid in London, by Reason of their Charter.

Smith *versus* Brampton. Mich. 7 Will. III. B. R.

(2.)
New Trial
denied in Case
for negligently
keeping
his Fire.
5 Mod. 87.

CASE for negligently keeping his Fire; Verdict pro Def. The Verdict was against Evidence, a new Trial was denied because it is a hard Action; Pet Note; Action against the Hundred for a Robbery, Verdict pro. Def. and new Trial granted. 1 Sid. 58.

S. C. call'd
Smith *versus*
Crumpton.

Smith *versus* Frampton. Mich. 7 Will. III. B. R.

(3.)
New Trial.
Vide post.
pl. 34.

IN Case for negligently keeping his Fire, per quod the Plaintiff's House was burnt; the Verdict was for the Defendant. And after great Debate and Consideration a new Trial was denied; because it is a hard Action, and the Jurors are Judges of the Fact: And yet Holt C. J. declared, he was not satisfied with that Verdict. Quære whether the same Case with the precedent.

Anonymus. Pasch. 8 Will. III. B. R.

(4.)
New Trial
Vide Post pl.
7, 8, 13, &c.

THE Court never, or very rarely, grants new Trials in Actions for Words. Per Holt C. J.

Smith *versus* Page. Mich. 8 Will. III. B. R.

(5.)
New Trial
against the
Equity of
the Cause.
Post pl. 11.
1 Mod. 2.
S. C. Comb.
387.

IN Ejectment the Plaintiff was a Mortgagee, and claimed by Surrender, whereas the Land was not Copyhold; and the Defendant claimed only by a voluntary Conveyance. The Verdict was for the Plaintiff, and the Court could not set it aside, and grant a new Trial against the Honesty of the Cause.

Hatchell *versus* Griffiths. Mich. 8 Will. III. B. R.

ISSUE was joined in Trinity-Term 1695, and Notice then given for Trial next Assizes, but no farther nor other Proceeding till Trinity Vacation 1696, and then the Plaintiff gave a new Notice of Trial, viz. fourteen Days Notice for next Assizes, when he accordingly tried the Cause and had a Verdict; but because there was no Proceeding within a Year after the first Notice, it was set aside: Sed Nota; Notice within the Term had been a Proceeding within the Year, and made Notice for fourteen Days good Notice of Trial.

(6.)
Notice of
Trial.
See 6 Mod.
18, 57.
1 Mod. 1.
Ante 457.

Anonymus. Mich. 8 Will. III. C. B.

S. C. 1 Salk.
273.
2 Salk. 222.

A New Trial was granted because the Counsel were absent, not thinking the Cause would come on, and no Defence was made; but a like Motion was denied in B. R. per Holt C. J. Also in one Coppin's Case, A Cause came on at seven in the Morn- ing, and an old Witness could not rise to be there Time enough; but it was denied, unless he would make Affidavit of what he knew, and would answer, so that the Court might judge of it, and how it was material.

(7.)
New Trial
for the Ab-
sence of
Counsel or
Evidence. Q.
Vide 6 Mod.
22, 222, 242.
Farell. 156.
Post 653.
2 Saund. 336.

Dent *versus* The Hundred of Hertford. Mich.
8 Will. III. B. R.

A New Trial was granted upon Affidavit, That the Foreman declared the Plaintiff should never have a Verdict whatever Witnesses he produced.

(8.)
See Farell.
31, & 37.

King *versus* Burdett. Mich. 8 Will. III. B. R.

A New Trial was mov'd for upon Affidavit, That the Jury took an Act of Common Council out with them, and that printed Libels were spread against the Defendant; and it was denied: For as to the first it differs from the Lady Ives's Case, where they took a Map of one Side, which was Evidence on either Side: But this was an Act of neither Side, and Evidence on both; but admitted to be irregular. Et per Holt C. J. so if a Jury eat at their own Charge, 'tis fineable, but that Verdict shall stand; otherwise if at the Charge of one of the Parties, and the Verdict is found for him. Vide Mo. 599.

(9.)
Jury after go-
ing from the
Bar sent for
an Act of
Common
Council gi-
ven in Evi-
dence, and
new Trial
denied.

Salisbury *versus* Proctor. Hill. 8 Will. III. B. R.

(10.)
Trial refused
to be put off
till Suit in
the Spiritual
Court deter-
mined.
S. C. 5 Mod.
324.
3 Salk. 130.

IN an Action by an Administrator the Court was moved to put off the Trial, till a Suit pending in the Spiritual Court concerning the Right of Administration was determined, which was to come on; which was denied per Cur'. For we cannot take Notice of Suits in the Ecclesiastical Courts.

Deerly *versus* The Duchess of Mazarine. Hill.
8 Will. III. B. R.

(11.)
New Trial
not granted
for Mistake
in Point of
Law against
the Honesty
and Equity
of the Cause.
Ante pl. 5.
S. C. Ante
116.
Comb. 402.

UPON Non Assumpsit pleaded, the Jury found for the Plaintiff, tho' the Duchess gave good Evidence of her Coverture; and the Court would not grant a new Trial, because there was no Reason why the Duchess who lived here as Feme Sole should set up Coverture to avoid the Payment of her just Debts.

Thermolin *versus* Cole. Hill. 8 Will. III. B. R.

(12.)
New Trial
for Want of
Notice after
Defence
made.

IF the Defendant appears and makes Defence, he shall not have a new Trial for Want of due Notice.

Ant. 428, 435.
S. C. ante
417.

Dominus Rex *versus* Bear. Pasch. 9 Will. III. B. R.

(13.)
Indictment
for Libel, De-
fendant ac-
quitted, and
new Trial
denied.
N. B. Farell.
31 & 37.
S. C. Ante
324, 417.
3 Salk. 226.
Carth. 407.
Cases B. R.
218.
Holt 422.

UPON an Indictment for a Libel, the Defendant was Verdict acquitted; Mr. Attorney General moved for a new Trial, but it was denied: And the Court said, That anciently was never done in criminal Cases where Defendants have been acquitted; Laterly where it has been a Verdict obtained by Fraud or Practice, as stealing away Witnesses, &c. it has been done but never yet was done merely upon the Reason that the Verdict was against Evidence. Postea Mich. 10 W. 3. B. R. Per Holt C. J. In Indictments of Perjury we never do it, because Verdict is against Evidence; but if you prove a Trick, as Notice, &c. it is otherwise. Vide 1 Lev. 9, 124. Ne serra, si def. soit acquit, alit. s'il soit convict.

See 2 Saund. 336. The Defendant in Error took out a Record of Nisi Prius, and proceeded to Trial at the first Assizes after it was joined; yet held good, and a new Trial denied.

Turbervil *versus* Stamp. Mich. 9 Will. III. B. R.

H. Shall not move for a new Trial after Motion in Arrest of Judgment; but after a Motion for a new Trial, he may move in Arrest of Judgment. So 'tis of a Writ of Inquiry; after Motion in Arrest of Judgment, the Defendant cannot move for a new Writ. West *versus* Cole, Mich. 10 W. 3. B. R. The same Point was held in C. B. Pasch. 8 W. 3. Philips *versus* Crabb.

(14.)
No Motion
for new Trial
after Motion
in Arrest of
Judgment.
S. C. Ante
13.
Comb. 459.
Carth. 425.
Skin. 681.
Cafes B. R.
151.
Holt 9.

Starr *versus* Wade. Pasch. 10 Will. III. B. R.

LESSOR brought Trover against the Lessee, for Trees cut down; yet because the Lessee did it in Trenching, and the Plaintiff had thereby greater Advantage, tho' the Jury found for the Defendant, yet the Court would not grant a new Trial.

(15.)

Wirs *versus* Polehampton. Mich. 10 Will. III. B. R.

IT was moved for a new Trial, because the Defendant having pleaded a Composition, had forgot to carry down Witnesses to prove the Subscribers Hands; and the Motion was denied, because the Debt was honest. And Holt C. J. remembered where Debt on a Bond was brought against an Heir, who pleaded Riens per Discent, but the Verdict went against him by omitting to bring the Settlement to the Trial; and the Court being moved, refused to grant a new Trial, because it was an honest Debt.

(16.)
New Trial
for Omission
of the Party
refused.
1 Salk. 273.
6 Mod. 222.

Anonymus. Mich. 10 Will. III. B. R.

IN Covenant to pay a Sum certain, viz. 100 l. and a Grant that upon Default it should be lawful for the Covenantor to enter and take the Profits; the Defendant pleaded Entry and Prizal of Profits in Bar, and Judgment was for the Plaintiff upon Demurrer, and upon the Writ of Inquiry the Jury gave Damages, and upon Motion a new Writ of Inquiry was awarded; for Debt might have been brought upon this Covenant; and this is not like an Issue where the Jury are to give no more Damages than are proved: But here the Jury are to give the whole, unless the Defendant proves something in Mitigation, which was not done in this Case; therefore tho' the Common Rule holds, viz. That no new Trial, or new Writ of Inquiry, shall be for too small Damages; yet there being a Contrivance in this Case, it differs.

(17.)
New Trial or
writ of In-
quiry not
granted for
too small Da-
mages, unless
where there
is a Trick.
Comb. 17,
170.

Sparks

Sparks *versus* Spicer. Hill. 10 Will. III. B. R.

(18.)
New Trial
rarely grant-
ed in hard
Actions.

ONE was ordered by the Judge of Assize to be hanged in Chains; the Officer hung him in privato solo; the Owner brought Trespass; and upon Not guilty the Jury found for the Defendant, and the Court would not grant a new Trial, it being done for Convenience of Place, and not to affront the Owner.

Lord Sandwich's Case. Trin. 11 Will. III. B. R.

(19.)
Trial at Bar,
where to be
granted or
denied.
Vide pag.
625, 644, 649,
& 651.
1 Vent. 64.
S. C. Holt
702.

WHERE there is Value or Difficulty, we are bound of common Right to grant Trials at the Bar. Inquisitiones degressis & pluribus Articulis, quæ magna indigeant examinatione, capiantur coram Justiciariis de Bancis. Stat. West. 2. c. 30. Per Holt C. J. Pet Trin. 1 Ann. it was denied, because the Plaintiff was poor, unless the Defendant would agree to take Nisi Prius Costs. Et postea scil. Trin. 4 Ann. B. R. Between the Trustees of my Lady Sandwich and my Lord Sandwich, tho' the Estate was 3000l. per Annum, a new Trial at Bar was denied, because the Title of the Lessor of the Plaintiff being from the Defendant himself, there would be nothing to do but to prove the Executing of a Conveyance.

Argent *versus* Sir Marmaduke Darrell. Hill.
11 Will. III. B. R.

(20.)
New Trial
after Trial at
Bar refused in
Ejectment,
because not
conclusive.
Vide post
650. pl. 27.
Ante 646.
pl. 13.
N. B. Farell.
31 & 37.
Comb. 18,
75.
S. C. Carth.
507.
Holt 702.

IN Ejectment after a Trial at Bar, Serjeant Wright moved for a new Trial, because the Verdict was contrary to Evidence; the Court thought so too. Rokeby was for it on the Case in Style, ceteri contra; for per Holt C. J. The Reason of granting new Trials upon Verdicts against Evidence at the Assizes is, because they are subordinate Trials appointed by West. 2. c. 30. Ubi de paucis Articulis & facilis est examinatio; and there have been new Trials anciently, as appears from this: That it is a good Challenge to the Juror, that he hath been a Juror before in the same Cause; but we must not make ourselves absolute Judges of Law and Fact too; and there never was a new Trial after a Trial at Bar in Ejectment, but in Case of ill Practice, for the Plaintiff may bring a new Ejectment: Upon this a new Trial at Bar was denied in Sir Richard Temple's Case, where the Jury found a Point of Law on the Statute of Bankrupts against the Opinion of the Court.

Anonymus. Hill. 11 Will. III. B. R.

IN Assumpsit for Money won at Play, the Trial shall not be stayed till an Indictment pending for the Cheat be tried. (21.)

Anonymus.

IN Assumpsit the Issue was, Married or not married, and the same Point was pending and ready to be determined in the Spiritual Court: And it was held no Cause to put off the Trial, for the Court cannot take Notice of that. (22.)

Trial not put off for Suit pending in the Ecclesiastical Court on the same Matter.

Turner *versus* Barnaby. Pasch. 1 Ann. B. R.

IF H. would have a Trial at Bar in Easter-Term, he ought to move for it in Hillary-Term; if in Michaelmas-Term, he ought to move for it in Trinity-Term, except where Lands lie in Middlesex; and anciently there was no other Notice given of such Trial, but the Rule in the Office; but now there must be fifteen Days Notice. Per Holt C. J. (23.)

When Trial at Bar to be moved for. Vide ante 625, 644, 648, & post 651.

Anonymus. Mich. 1 Ann. B. R.

S. P. Farell. 53, 64. Vide 6 Mod.

A New Trial shall be granted if the Judge of Nisi Prius misdirect the Jury, because those Trials are subject to the Inspection of the Court. Per Holt C. J. (24.)

New Trial for Misdirection.

Clerk *versus* Udall. Mich. 1 Ann. B. R.

S. C. Farell. 106.

UPON a Trial at Nisi Prius the Jury gave excessive Damages, and for this Cause a new Trial was granted. The second Jury gave the same Damages again, and a second new Trial was moved for, and denied, because there ought to be an End of Things; but several Cases were cited which the Chief Justice allowed, That where upon the second Trial the Jury have doubled the Damages, a third Trial had been granted. (25.)

New Trial for excessive Damages, and the same Damages given, and third Trial refused. See 6 Mod. 22, 242. 1 Lev. 97. 1 Sid. 131. Comb. 17, 170.

The

S. C. Farell.
84, 85.
2 Salk. 201.
pl. 4.
3 Salk. 363.
Holt 184.

The Case of the Mayor and Aldermen of Bristol.
Mich. 1 Ann. B. R.

(26.)
Nonew Trial
in inferior
Courts.
1 Salk. 148,
149, 396.
Farell. 38.

IT was held by the Court that a new Trial cannot be granted in an inferior Court; for they are not like Trials by Nisi Prius, which are subordinate upon Writs issuing out of this Court, over which the Court have Authority and Inspection; but this was a new Trial a Year after the first, which the Court blamed.

S. C. 1 Salk.
258.
Ante 258.
Farell. 70,
121, 156.
Holt 265,
266.

Fenwick versus Lady Grosvenor. Hill. 1 Ann. B. R.

(27.)
New Trial
denied after
Trial at Bar.
5 Mod. 88,
350.

IN Ejectment after a Trial at Bar, a new Trial was moved for, on Affidavits that several Witnesses absented themselves in Holland, by Reason of a Report spread abroad there, that one of the Defendant's Witnesses was confined by Imprisonment; but it was denied, because it did not appear that the Plaintiff did spread it, or occasioned the spreading of it: The Court was dissatisfied with the Verdict, but cited Cross's Case for a false Return of a Mandamus tried at Bar, and by Consent of all Sides one Point was to be found Specially, yet the Jury found a general Verdict, and the Court would not grant a new Trial. It has never been done here but upon Issues out of Chancery, which being only to satisfy the Conscience of the Chancellor, are not stricti Juris. So a new Trial was denied, contra opinionem (ut videbatur) Capital. Justiciar'.

Gay & Cross,
Farell. 37.
6 Mod. 18,
22, 307.

Ashwin versus Corbill. Mich. 2 Ann. B. R.

(28.)
A Term's
Notice.
Vide ante
624, 514.
6 Mod. 146.

IF a Cause hath lain at Issue four Terms and no Proceedings there must be a full Term's Notice of Trial, excluding the Term wherein Issue was joined.

S. C. ante 457.
6 Mod. 57.

Lazier versus Dyer. Mich. 2 Ann. B. R.

(29.)
Suing out a
Venirefacias
tested the last
Day of the
Term, not a
Proceeding
within Term
as to Notice
of Trial.

IT came to be a Question, Whether the Suing out of a Venirefacias or Distringas after the Expiration of the four Terms, was a Proceeding within the Term; because it bears Teste the last Day of the Term, and has Relation to the Term? And the Court held it was not; for tho' it be legally a Proceeding of the Term yet it is not so in Fact. Et Nota; Where 'tis an Issue out of Chancery, Notice of Trial to the Solicitor in that Court is good; for as to this, they are but as one Court.

Sir Samuel Astrey's *Case*. Hill. 2 Ann. B. R.

S. C. 6 Mod.
123.

UPON a Scire facias brought against Sir Samuel Astrey, for his Place of Clerk of the Crown in the Court of King's Bench, and Issue joined thereupon; Sir Samuel Astrey moved that the Issue might be tried at the Bar. The Attorney General opposed it; but the Court said a Trial at Bar was never denied to any Officer of the Court, nor hardly to any Gentleman at the Bar: And tho' Mr. Attorney was never bound to consent to a Trial by Nisi Prius in the Queen's Case, yet they did not see how he could refuse a Trial at Bar, where it was reasonable to try it there; for the Stat. West. 2. cap. 3. is *atterminetur*, that they may be determined there, *quæ magna indigeant examinatione*.

(50.)
Trials at Bar
not denied to
Officers of
the Court, or
Barristers.
Vide ante
625.
2 Keb. 155,
164.
1 Cro. 248.
1 Inst. 424.

Way *versus* Yally. Trin. 3 Ann. B. R.

S. C. 6 Mod.
194.
3 Salk. 381.
Holt 705.

LESSOR brought Debt for Rent against his Lessee, upon a Demise at London, of Lands in Jamaica. The Defendant pleaded to the Jurisdiction of the Court, That the Matter ought to be tried in Jamaica; and it was urged that the Lessor cannot bring Debt here against the Assignee of a Term of Lands in Ireland, and that if Entry and Duffer were pleaded, it could not be tried here; and in this Case the Right of the Plaintiff and Defendant depends on foreign Laws which cannot be given in Evidence here. Et per Cur', Where an Action is local it must be laid accordingly; therefore if the Lessor declares on the Privy of Estate, and that lies in Ireland, the Action must be brought there, for the Estate is local; therefore such Lessor cannot maintain Debt here against an Assignee of a Term in Ireland; for the Action is founded on a Privy of Estate: Otherwise where it is founded on a Privy of Contract, which is transitory; as Debt for Rent by Lessor against Lessee; for that may be maintained where the Land lies not. Here it is by the Lessor against the Lessee on the Privy of Contract; and if a foreign Issue, which is local, should happen, it may be tried where the Action is laid; for that Purpose there may be a Suggestion entered on the Roll, That such a Place in such a County is next adjacent; and it may be tried here by a Jury from that Place, according to the Laws of that Country; and upon Nil debet pleaded you may give the Laws of that Country in Evidence.

(31.)
If the principal Cause be within the Jurisdiction, and an Issue depending on foreign Laws arises it may be tried in the next County, and foreign Laws given in Evidence.
See 1 Lev. 143.
6 Mod. 228.
1 Jon. 43, 44.
2 Saund. 258.
Hob. 37.
1 Cro. 145,
183.
1 Co. 2.
1 Saund. 238.
1 Vent. 59.
Hob. 233.
2 Cro. 76.
1 Inst. 26. b.

S. C. 1 Salk.
380.
6 Mod. 245.
Rep. A. Q.
53.

Domina Regina *versus* Sir Jacob Banks. Mich.
3 Ann. B. R.

(32.)
Trial by Pro-
viso cannot
be in the
Case of the
Crown; nor
Nisi Prius,
unless by
Warrant
from the
Attorney
General.
6 Mod. 246,
&c. infra.

SIR Jacob Banks was indicted at the Quarter-Sessions in Berks, and the Indictment was moved hither by the Prosecutor, and now both the Prosecutor and Defendant made up the Record, took out Process, and carried down the Cause to Trial at the Assizes; and the Defendant put in his Record first, tried it, and was acquitted: The Prosecutor upon this moved for a new Trial, and had it.

Et per Cur. 1st, Before the 5 & 6 W. & M. c. 11. and 8 & 9 W. 3. c. 33. H. indicted in any County might remove it into B. R. by Certiorari, and never was bound by Recognizance to try it, unless in London and Middlesex; That by this Means the Defendant was out of Court, & sine die, and new Process was to be awarded, on which he might be outlawed, unless he came in gratis, which occasioned great Delay, and was the Cause of making those Acts.

Upon Removal of Indictment by the Prosecutor, if Defendant comes in by Process, he shall give Security to try.

2dly, That Removals by Defendants are provided for, but Removals by Prosecutors are not within those Acts; and that this Removal being before the Plea pleaded, the Defendant was out of Court & sine die, but may come in gratis, or be brought in by Process; and in the last Case on Pleading shall give Security to try it, which he is not obliged to do when he comes in gratis.

In what Cases the Defendant may carry down a Cause by Proviso.
2 Lev. 5, 6,
&c. infra
6 Mod. 240.
&c. 125.
Savil 2.
2 Sid. 536.

3dly, That in Civil Actions the Defendant shall never carry down a Cause by Proviso, till there be a Laches in the Plaintiff except in Causes where the Defendant is as a Plaintiff, as in Replevin, Prohibition, Quare Impedit, which are to have Return Consultation, and Writ to the Bishop.

4thly, There can be no Trial by Proviso in a Cause of the Crown; because there can be no Default nor Laches, nor can the Crown be compelled to try any Cause by Nisi Prius; and therefore every Cause of the Crown in this Court must be tried at Bar, unless the Attorney General allows a Warrant of Nisi Prius, which implies his Consent to try the Cause in the County.

5thly, That as in Indictments of Treason or Felony, if the Attorney General will delay, the Court may give the Defendant Leave to bring on the Trial as they see fit (and so it has been done): So in Indictments for Misdemeanors, as in this Case the Defendant may in the first Instance by the Consent of the Prosecutor, and Leave of the Attorney General, carry down the Cause to Trial; but it shall not be allowed by Surprise on the Attorney General, as here in this Case, and also without Consent of the Prosecutor, or any Default in him.

stly, It was ordered to be a Rule hereafter, That when an Indiamment is removed hither by the Prosecutor, the Defendant shall not carry it down to Trial without Leave of the Court on Motion. 6 Mod. 247.

Highmore *versus* Walker. Mich. 4 Ann. B. R.

IN a Cause to be tried at the Sittings, the Defendant entered a Ne recipiatur; and the Question was, Whether the Plaintiff could go on at the next Sittings without a new Notice? It was agreed, That if no Ne recipiatur had been entered, there must have been two Days Notice. The Clerks upon the principal Question thought no Notice necessary; their Reason was, because the Defendant himself had hindered the Plaintiff's Proceeding, and therefore ought at Peril to attend the next Sittings. But Holt C. J. contra. The Notice fell to the Ground with the Trial: A Rule was made, That where a Ne recipiatur was entered, the Plaintiff shall give Notice the same Sittings, and before they are over, that he will proceed to Trial the next Sittings: And it was said, that if a Cause be not entered two Days before the Sittings, the Defendant may enter a Ne recipiatur. (33.) Two Days Notice to be given after Ne Recipiatur at Sittings.

Dunkly *versus* Wade. Pasch. 5 Ann. B. R.

IN Case for negligently keeping his Fire, a Verdict was found for the Plaintiff, and a new Trial granted. But per Cur, had a Verdict been for the Defendant, we would hardly have granted a new Trial, because 'tis a hard Action. (34.) Hard Action. Vide ante 644, 645. Pl. 18.

Ford *versus* Tilly.

S. C. Farell.
156, 157.

AN Inquiry found four voluntary Escapes, for which Ford Warden of the Fleet forfeited his Office: Issues hereupon were tried in B. R. at the Bar. One Escape was proved by a Witness, who was asked if he was never burnt in the Hand for stealing a Tankard; he answered, No. A new Trial was moved upon producing the Record of the Conviction, and the Court denied the Motion, 1st, Because it was a Trial at Bar. 2dly, It is no Reason for a new Trial that you for the Defendant came not prepared; and the Chief Justice said Soam's Case was a hard Case. Vide 3 Keb. 365, 369. 2 Lev. 114. Postea Pasch. 4 Ann. B. R. Between Cockcroft and Smith. That the Party's Evidence was not ready, was held no Reason for a new Trial, tho' at Nisi prius: And a new Trial was denied. (35.) New Trial not granted for Defect of Preparation. See 6 Mod. 22, 222, 242, Ante 645. 1 Salk. 258. 273. Hardr. 71, 121.

Trover and Conversion.

Ante 597.
1 Lev. 99.
2 Lev. 201.
3 Lev. 336.
5 Mod. 182,
&c.
6 Mod. 151,
170, 212.
Vide 4 Mod.
156.
Yelv. 68.

(1.)
Trover de
scripto suo
obligatorio,
good.
S. C. 3 Salk.
247.
Holt 498.

Arnold *versus* Jeffreyson. Mich. 9 Will. III. C. B.

TROVER de scripto suo obligatorio per quod tent. & obligat. fuit cuidam J. S. In Arrest of Judgment after Verdict for the Plaintiff, it was held good; for it might be given to the Plaintiff, and so shall be intended, and then it was scriptum suum; and it is no Absurdity, tho' it were made by him to another; for it is only a Description of the Deed.

Hartford *versus* Jones. Mich. 10 Will. III. B. R.

(2.)
Special Plea
in Trover
must confess
a Conversion.
Lutw. 1538.
1 Mod. 244.
S. C. 3 Salk.
366.

IN Trover and Conversion the Defendant pleaded, That the Goods were cast away, and they saved and detained them till they were paid for their Pains: On Demurrer Holt C. J. held That they might retain for Payment, as a Carrier for his Hire and Salvage is allowed by all Nations: He that serves another ought in Reason to be paid for his Service; but the Plea naught; for if the Detainer be lawful, he does not confess Conversion: I never knew but one Special Plea good in Trover, viz. Yelv. 198. And the Rule was in the principal Case to waive the Plea and plead Not guilty. Vide 2 Cro. 68, 69, 3 Cro. 262.

Hartford *versus* Jones. Pasch. 10 Will. III. B. R.

(3.)
Trover for
20 Ounces of
Cloves and
Mace, well,
without
shewing how
much of each,
or that they
were mix'd,
is ill in Detinue.
Quær. Vide
5 Mod. 181,
324.
1 Lev. 48.
3 Lev. 18.
2 Lev. 85,
176.
2 Vent. 67.

TROVER for twenty Dunces of Cloves and Mace; after Writ of Inquiry on a Judgment by Default, Holt C. J. doubted whether it was good, because it was not said, how much Cloves and how much Mace; or that it was so much of each, or that it was so much of one and so much of the other; but he said these were Incertainties, and if this was comprised in another Action, this Recovery would be a good Plea in Bar. In Detinue, this would be ill Incertainty; for the Sheriff could not tell how much of one or how much of the other to deliver. The Court gave Judgment for the Plaintiff, without taking Notice of another Error.

tion, viz. That it was also pro viginti parvis Instrument. car- 3 Mod. 70.
pentar', vocat. twenty small Carpenter's Tools. 2 Saund. 74. 4 Mod. 324.
2 Ven. 76. Style 345. 1 Mod. 289. 2 Ven. 677. 5 Mod. 324.
1 Sid. 60,
445.
1 Lev. 48. Farell. 142. 1 Mod. 46. 1 Vent. 317. 2 Saund. 74.

Anonymus. Trin. 3 Ann. Coram Trevor C. J. At
Nisi Prius at Guildhall.

TROVER lies not against a Carrier for Negligence, as for (4)
losing a Box, but it does for an actual Wrong; as if he Where Tro-
break it to take out Goods, or sell it. Per Cur'. Pasch. 7 W. 3. B. R. ver will lie
And therefore Denial is no Evidence of a Conversion, if the Thing against a
appears to have been really lost by Negligence; but if that does not Carrier.
appear, or if the Carrier had it in Custody when he denied to deliver 1 Mod. 30, 51.
it, it is good Evidence of a Conversion. Per Trevor C. J. Comb. 353.
1 Danv. 21.
6 Mod. 212.

Where Denial is a Conversion. Vide 10 Co. 56. 1 Cro. 262.
1 Lev. 173. 1 Danv. 21. 2 Mod. 245. 3 Mod. 2. (1 Mod. 244.)
5 Mod. 426. 2 Show. Cas. 148, 175, 213.

T Y T H E S.

Hick *versus* Woodson. Hill. 8 Will. III. B. R.

IN Attachment sur Prohibition, the Plaintiff declared of a
Custom in such a Hundred, to pay no Tithe for Agistment of
Cattle barren: Issue was taken upon the Custom, and found
for the Plaintiff, but Judgment was arrested with this En-
t, Et quia apparet Curia Domini Regis hic quod consuetudo
ed. nullius Vigoris in lege existit, ideo fiat Consultatio, &c. Et
Cur',
ist, Tithe of Agistment is due of common Right, because the
als, &c. which is eaten, is de jure titheable, and must have
Tithe if cut at Perfection: And the Court took this Disfe-
re, viz.

That a Hundred or a County cannot prescribe in a Non deci-
ando, for a Thing that is in it's Nature de jure titheable;
as no one single Person, or his Estate, can; no more, by the
Reason, can the Hundred, which consists but of many single
Persons Estates. Vide March 26. 1 Ro. Ab. 653.

See 1 Mod.
229.
6 Mod. 261.
4 Mod. 336,
&c.
S. C. 4 Mod.
336 to 341.
(1.)
County or
Hundred can-
not prescribe
in a Non deci-
mando for
Things tithe-
able of com-
mon Right;
otherwise if
not titheable
of common
Right.
Tithe of A-
gistment of
barren Cattle
due of com-
mon Right.
Vide Farell.
113, 137.
1 Saund.
141, 142.
Carth. 392.
Comb. 403.
Skin. 560.
Holt 671.
Cases B. R.
111.

But

4 Mod. 336.

to 341.

Lutw. 1316.

Farr. 113,

157.

Vide 6 Mod.

261.

S. C. call'd

Leicester

vers. Foy.

Ante 554.

(2.)

Carth. 461.

S. C.

Modus to

pay a whole

Meal's Milk

such a Day,

and every

9th and 10th

Night and

Morning af-

ter, till a

young Lamb

yeaned be

heard to

bleat, in lieu

of Tithe of

Milk ill.

Modus to

pay Part of

the very

Thing that

is Tithe, not

good, unless

payable in

another Manner.

But of Things which in their Nature are not titheable, de jure, a Hundred or County may prescribe in a Non decimando, because they are discharged in such Case without a Custom to the contrary, and they do but insist on their ancient Right, and that Custom hath not prevailed against it: Ergo the Case of Wood, 1 Ro. Ab. 654. Lit. Rep. 152, 153. and the Hearth-Penny, which is but a Modus for it, they allowed to be good Law; because Wood is not in its Nature titheable, nor within the Reason of titheable Things, which come not to Perfection every Year.

Hill *versus* Vaux. Mich. 10 Will. III. B. R.

ON a Suit in the Spiritual Court for Tithe of Milk, the Plaintiff moved for a Prohibition, suggesting a Custom in the Parish, that the 9th Day of May at Night, and the 10th Day of May in the Morning, the Parson was to have the whole Seal's Milk, and so every 9th and 10th Night and Morning, till a young Lamb yeaned should be heard to bleat, in Lieu of all Tithe of Milk. And the Case of thirty Eggs, in Lieu of all Eggs, was cited 1 Ro. Ab. 648, 651. Et per Cur', A Modus to pay one Thing for another, or a Part of the same Thing in another Manner, may be good; but a Prescription to pay Part of the very Thing that is Tithe, can never be a good Modus, unless payable in some other Manner, so that the Parson has a Benefit by it. 3 Cro. 609. 2 Cro. 47. 1 And. 799. Mod. 229. Holt 250. Raym. 277. 3 Bull. 326. As to the Case of the thirty Eggs he is bound to pay that, whether he has Pens or no, and he must pay it at a certain Time. But by this Modus the Parson may have nothing; as suppose a Lamb be heard to bleat before the 9th of May.

Lat. 222. 6 Mod. 261. Raym. 277. 1 Mod. 229. Cases B. R. 206. Holt 67.

The Archbishop of York *versus* The Duke of Newcastle
Mich. 3 Ann. In Scacc.

(3.)
Modus of ten
Fleeces of
Wool and
two Lambs,
for all Tithe:
Court divided
whether
good, or not.
Vide 1 Mod.
321.

H. Prescribed to pay ten Fleeces of Wool and two Lambs in Lieu of all Tithes; and Price and Bury Barons, were of Opinion this was an ill Modus; because 'tis one Species of Tithe for another, and there is great Uncertainty; for one Fleece may be twice as big, and three Times the Value of another. Vide 2 Lutw. 1052. 3 Cro. 786, 276. Mo. 909. 1 Ro. Ab. 649. Dy. 149. Hard. 174. Ward Chief Baron, and Smith Baron contra. 1st, A Modus is nothing but a real Composition, for or in Lieu of Tithes, or an annual Profit certain and permanent; and they held that the Payment of any one Chattel for Tithe, was might be a good Modus as well as Money; for why might not the

Parson originally agree to take ten fleeces for his Tithe, as well as a Penny? They admitted that Payment of Tithe of one Species, or Payment of a Modus for one Species of Tithe, could not be a Discharge as to another Species; but they held that this was not a Payment of Tithe, nor a Payment for a Species of Tithe; because it was to be paid at all Events, whether there be Sheep or no: And they denied the Case of 1 Ro. Ab. 651. and held it no more uncertain than to pay a Modus of ten Cheeses, which may differ vastly, both in Nature, Quantity, and Value; and it tends to the Disquiet of the Country to break in upon Customs and Usages; and it ought not to be done but on plain and manifest Reason.

Payment of Tithe of one Species not a good Modus for all. Cro. El. 446. Moor 277, 445. Lutw. 1048, 1051.

Startupp *versus* Dodderidge. Pasch. 4 Ann. B. R.

A Modus to pay 2 s. in the Pound of the improved Rent in Lieu of all Tithes, was held naught; for that is to rise and fall as the Land is let, and the Parson cannot know it: And tho' a Custom to pay the double Value for a Fine may be good; yet that arises to a Man's Contract, which shall never be void where it may be reduced to any Certainty, and differs from this Case of a Modus, which ought to be as certain as the Duty, which is destroyed by it. Holt C. J. dubitante, upon a Motion for a Prohibition.

(4.) Modus to pay 2 s. in the Pound of the improved Rent, ill. Modus should be as certain as the Duty destroyed by it. See Lutw. 1043 to 1053, &c. supra. Ante 551. S. C. Rep. A. Q. 60. Lilly Ent. 19.

V A-

Ante 454,
452.

V A R I A N C E.

Bragg *versus* Digby. Pasch. 10 Will. III. B. R.

(1.)
Variance be-
tween Writ
and Count
not pleadable
without cra-
ving Oyer of
the Writ.
Oyer. Vide
ante 497. &
post 701.
3 Lev. 236.
1 Saund. 118.
6 Mod. 303.
S. C. Cases
B. R. 189.

IN Case on several Promises by Original, the Defendant without craving Oyer of the Writ, pleaded Variance between the Writ and the Count, shewing particularly where in: And the Plaintiff demurred; and it was adjudg'd that the Defendant should answer over; for he ought to have demanded Oyer of the Writ before he could take Advantage of the Variance; because tho' the Writ is in Court, yet being not upon the same Roll with the Count, the Defendant cannot plead to it without demanding Oyer.

Holman *versus* Borough. Trin. 1 Ann. B. R.

(2.)
Deed dated
in the Year
of our Lord
set forth with
the Year of
the King also,
no Variance.

IN Covenant, the Plaintiff declared of a Deed of Covenant bearing Date the 30th of March Anno Domini 1701. Anno Regni Willi. tertii nunc Regis Angl', &c. Decimo tertio, and makes a Profert of the Deed, with a Cujus dat. est eisdem die Anno; Upon Oyer craved, the Deed was dated only thus, viz. the 30th of March 1701. wanting Anno Domini, and likewise Anno Regni. And tho' it was demurred to for the Variance, the Court held it no Variance; for it was implicitly in the Deed. Vide 41 E. 3. 23.

S. C. Far. 87.
Holt 200.

Inclendon *versus* Crips. Mich. 1 Ann. B. R.

(3.)
In Debt
where the
Quantity of
the Duty de-
pends upon
the Deed,
Variance is
fatal, and
cannot be
help'd by
Remittitur;
otherwise
where on
Matter ex-
trinsic.

IN Debt, the Plaintiff declared on a Deed, whereby the Defendant covenanted to pay the Plaintiff 35 l. per Hundred for every Hundred of Wood in such a Place, and that he delivered so many Hundreds and one half, which came to 182 l. 10s. The Defendant demurred. Et per Cur',
There can be no Apportionment, and the Demand for the hundred, is demanding more than can be due by the Contract; and then the Question was, Whether a Remittitur could be entered for that, and Judgment given for the rest. Et per Holt C.

Where the Sum demanded depends on the Deed it self, and on nothing extrinſical, as in Caſe of Debt or Covenant to pay 20l. there can be no Remittitur; for the Variance which is made is conſiſtent with the Deed upon which the Duty that is demanded intirely depends; otherwiſe where it may be more or leſs by Matter extrinſick; as in Debt for Rent, or in the Caſe at Bar; in that Caſe, if more be demanded than is due, it may be remitted; for the Variance is not inconſiſtent with the Deed: And as the Plaintiff is to recover on Trial what appears on Evidence to be due; ſo on Demurrer he is to have Judgment for no more than he ought to recover, and may remit the reſt. Vide Hob. 178. Dy. 65. Yelv. 66. 10 H. 6. 5. 1 Saund. 206, 286.

1 Salk. 139.
1 Lutw. 459,
539.
2 Vent. 129.
1 Show. 8, 9.
Cro. Car. 137,
436, 437.
1 Saund. 282,
285.
Farell. 143,
148.
5 Mod. 213,
1 Sid. 407.

Chetley *verſus* Wood. Mich. 2 Ann. B. R.

IN Debt upon a Recognizance, the Plaintiff declared as on a Recognizance acknowledged in the Court of Common Pleas, coram G. Treby, Mil. & ſociis ſuis; Nul tiel Record was pleaded, and the Record produced was a Recognizance taken before M. Juſtice Nevil, at his Chambers in Serjeants-Inn, and by him brought and delivered into Court; and it was adjudged that the Plaintiff has failed of his Record: For the Record is ſuch as it is entered upon the Roll, and in Pleading muſt be ſo deſcribed: Accordingly the Court of King's Bench do enter all Recognizances as taken in Court, but the Common Pleas enter ſpecially; ſo that theſe Recognizances bind from the Caption, ſours from the Time of Entry; alſo upon theſe a Scire facias lies in either County; But on a Recognizance in B. R. in the County of Middleſex only; therefore theſe differ in Subſtance; and as to the Uſage of declaring this Way, which was inſiſted on, the Chief Juſtice ſaid it was againſt Law.

Vide ante
564, 600.
6 Mod. 42,
132.
Far. 120, 121.

(4.)
Recogni-
zance in C. B.
taken at a
Judge's
Chamber
pleaded aſta-
ken in Court;
Variance.
Lutw. 1287.
S. C. 3 D.
314. p. 6.
Holt 612.
Recogni-
zance of Bail
in C. B. binds
from the Cap-
tion, in B. R.
from the En-
try only.
Mod. Caſes
42. S. C.
1 Cro. 312.
Hob. 195.
Aleyn 12.

Roberts *verſus* Harnage. Mich. 3 Ann. B. R.

IN Debt upon a Bond, the Plaintiff declared, quod cum the Defendant apud London, viz. in Paroch. beatæ Mariæ de creubus in Warda de Cheape per ſcriptum ſuum obligatorium conceſſiſſet ſe teneri to the Plaintiff in 40l. ſolvend. to the Plaintiff, &c. the Defendant craved Oyer, and the Bond was to the Plaintiff to pay 40l. to his Attorney or his Assigns; and was ated at Port St. Davids in the Eaſt-Indies. The Defendant pleaded theſe Variances in Abatement, and on Demurrer the Court held, That the firſt was no Variance; for Payment to the Plaintiff or his Attorney is the ſame Thing: The Teneri made it a Debt

(5.)
Bond to A.
in 40l. ſol-
vend. to his
Attorney, de-
clared on as
payable to
A. and no
Variance.
S. C. 6 Mod.
228.

to the Plaintiff, and in Consequence it may be payed to him; Solvendum to any Body else would be repugnant. Vide 4 Ed. 4. 29. Sid. 295. 2 Keb. 81. But Payment to the Plaintiff's Attorney or his Assignee, is the same Thing.

2dly, The second Variance was held fatal, tho' it was objected that the Place was only used as a Venue, for the Dating made the Bond local; and it is not a Bond dated at London, because there is an express Date at Port St. Davids; but the Plaintiff might have declared, that the Defendant apud Port St. Davids in the East-Indies, viz. apud London. in Paroch', &c. for that was only using London, &c. for a Place of Trial. Broderick pro Quer. Parker pro Def'.

Darby *versus* Anely. Trin. 4 Ann. B. R.

(6.)
Writ of Error
of a Record
per billam,
the Record
returned per
breve de Pri-
vilegio,
quash'd.

A Writ of Error was brought of a Judgment in C. B. reciting, quia in Recordo & processu ac etiam in redditione Judicii loquelæ quæ fuit in Curia nostra per billam. The Record was Attachiatus fuit per breve de Privilegio e Curia hic emanans ad respondend. the Plaintiff an Attorney of that Court juxta libertates, &c. de placito transgr. super Casum; and the Writ of Error was quashed for this Variance. Vide Lutw. 1634, 1637, 905.

Domina Regina *versus* Dr. Drake. Mich. 5 Ann. B. R.

(7.)
Information
for a Libel,
Variance in
the Word *not*
for *not* held
fatal upon
Evidence.
See 6 Mod.
168.
Raym. 74.
Tenor im-
ports a true
Copy.
1 Keb. 531.
Farell. 101.
Hob. 59.
1 Sid. 148,
153, 217.
S. C. 3 Salk.
224.
Rep. A. Q.
78, 84, 95.
Holt 347,
349, 350,
425.

INFORMATION, for that the Defendant being evilly disposed to the Government, did make a Libel, in which Libel were contained divers scandalous Matters secundum tenorem sequent', and in setting forth a Sentence of the Libel, it was recited with the Word *not* instead of *not*; but note, the Sense was not altered thereby. The Defendant pleaded Not guilty; and this appearing upon Evidence, a Special Verdict was found. Et per Curiam 1st, Cujus quidem tenor imports a true Copy. Vide Reg. 169. 8 Co. 78. Co. Ent. 508. 2 Saund. 121. in hac quæ sequitur forma, 5 Co. 53. Tenor is a Transcript, and implies the verum same.

2dly, They held that this was not a Tenor, by Reason of the Variance; for *not* and *not* are different; different in Grammar and different in Sense: And Powys J. held as to the Point where literal Omissions, &c. would be fatal, that where a Letter omitted or changed makes another Word, 'tis a fatal Variance otherwise where the Word continues the same: And in the principal Case, no Man would swear this to be a true Copy.

3dly, The Court held, That there was a Difference between Words spoken and Words written; of the former there could not be a Tenor; for there was no Original to compare them with, as there is of Words written; and tho' there has been Attempts to plead a Quorum Tenor of Words spoken, it has never been allowed; and therefore where one declares for Words spoken, Variance in the Omission or Addition of a Word, is not material; and it is sufficient if so many of the Words be proved and found as are in themselves actionable. Vide Dy. 75. 3 Cro. 503. Hard. 470. Otherwise in Debt upon a Bond; for upon Non est factum, any Variance is fatal.

In declaring for Words spoken, Variance in Omission or Addition not material, if the Words proved are actionable; otherwise in a Tenor of Words written.

4thly, Holt C. J. held, That in pleading there were two Ways of describing a Libel or other Writing, by the Words or by the Sense: By the Words, as if you declare of a Libel, cujus tenor sequitur, &c. or quæ sequitur in his Anglicanis verbis sequentibus, you describe it by its particular Words, of which each is such a Mark, that if you vary, you fail in making good their Description. Vide Dy. 203. If a Man bring Trespass quare clausum fregit, and sets forth Abuttals and Bounds, and fails in proving them, he is gone; and yet he needed not to have described it after that Manner. 2dly, You may describe it by its Sense and Meaning; thus it is a good Information to shew, That the Defendant made a Writing, and therein said so and so, translating it into Latin; in which Case, Exactness in Words is not so material, because it is described by the Sense and Substance of it.

In pleading a Libel maybe set forth in hæc verba, or by the Sense and Substance of it.

VERDICTS.

Vide Co. Lit.
226.
1 Saund. 230.
2 Saund. 97,
171, 255.
Raym. 193.
5 Mod. 351.

Buxendin *versus* Sharp. Pasch. 8 Will. III. C. B.

(1.)
S. C. 3 Salk.
12.

THE Plaintiff declared that the Defendant kept a Bull that used to run at Men; but did not say, Sciens or Scier, &c. This was held naught after a Verdict; for the Action lies not unless the Master knows of this Quality, and we cannot intend it was proved at the Trial, for the Plaintiff need not prove more than is in his Declaration.

Jenkins *versus* Turner. Mich. 8 Will. III. C. B.

(2.)
Action for
keeping a
Boar ad mor-
dend' anima-
lia consuet.
held well af-
ter Verdict.
1 Show. 539.
1 Lutw. 899.
S. C. 3 Salk.
13.

THE Plaintiff declared that the Defendant kept a Boar ad mordend' animalia consuet', and knew of this habit, and that the Boar did bite, &c. This was held good after Verdict, tho' it was objected that these Animals may be Frogs or Hice, &c. for we must intend there was Proof of biting such Animals as will support the Action, otherwise the Judge and Jury would not have concurred in this Verdict, whereby the Plaintiff recovers Damages: And as to another Objection, viz. That the Defendant cannot know what Animals he is to defend against; 'twas answered, That no Evidence can be given of killing any Animals but what he has knowledge of.

Acton *versus* Eels. Mich. 8 Will. III. B. R.

(3.)
Damages gi-
ven in Tres-
pafs laid at a
Time not
come, it shall
be intended
another Time
was proved.
Vide 1 Mod.
292.

IN Trespafs for Assault and Battery, and Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Time laid in the Declaration was not yet come. Et per Cur', Then it is a Time impossible, and the Jury must be supposed to give Damages for another Trespafs; and it is as if no Time had been alledged; otherwise if the Time had been laid after the Action, and before the Verdict, for that shall be intended to be the Trespafs that was given in Evidence, and that was after the Action brought; and so it is where it appears that the Jury give Damages for a Time not come, as in 2 Saund. 169. where the contrary cannot be

be intended, 3 Keb. 304. in Point. Judgment for the Plaintiff
Then Northey moved that they might have Leave to enter the
Judgment as of the preceding Term, because the Plaintiff died
since the Verdict. Curia, Enter it as you can, but at your Pe-
ril, we give no Leave nor Directions about it.

Roe *versus* Gatehouse. Mich. 8 Will. III. B. R.

ASSUMPSIT, quod cum the Defendant was indebted to him
in 5 l. for Money lent, and promised to pay; Cumq; etiam
at the Request of the Defendant the Plaintiff found Horse-meat
for J. S. super se Assumpsit; and says not that the Defendant super
se Assumpsit. A Verdict being for the Plaintiff and intire Da-
mages, and a Writ of Error brought in B. R. relying upon 3 Cro.
913. and Noy 50. for J. S. might as well be the Person promi-
sing as the Defendant; and the Promise is the Gift of the Adion;
and an Incertainty in that cannot be cured by Intendment after
Verdict. Sed per Cur', It being said positively at first, That the
Defendant super se Assumpsit, and then cumq; etiam, &c. the
same Nominative shall go to all the Promises; and by Reason of
the Word Etiam, it cannot be intended of a Promise by J. S. for
he had not promised before. Judgment affirmed. Vide Sid. 292.
306. Lutw. 125. 3 Co. 703.

(4)
Incertaincy
in Count cu-
red by Ver-
dict.
Vide 1 Lutw.
899.
1 Saund. 154.
155.
2 Saund. 171.
2 Vent. 141.
142, 196.
Carth. 379.
S. C.
1 Lutw. 234.
6 Mod. 227,
268, &c.
Farell. 143.
S. C. 5 Mod.
305.
3 Lev. 55.
1 Sid. 309.
1 Saund. 6, 7.
Comb. 404.

Prince *versus* Molt. Pasch. 9 Will. III. B. R.

IN Case the Plaintiff declared, Quod cum quer' 3 Julii / posses-
sionat. fuisset de quodam clauso prati prædict. defend. 3 Au-
gusti crexit novum molendinum & aquam currentem fecit inun-
dare per quod inundavit clausum suum prædict. per quod totum
usum & proficuum inde eodem secundo die Julii usque tempus ex-
hibitionis billæ prædict. amisit: Verdict pro Quer. and intire Da-
mages; but Judgment was arrested; for an Erection on the 3d
Day of August, might make him lose a particular Gain or Pro-
fit from the 2d Day of July, as if he had laid in the Meadow
for Hay. But by an Erection on the 3d Day of August he could
never lose totam usum & proficuum from the 2d Day of July;
therefore he has recovered more Damages than he ought, and
this Case is not to be distinguished from Moor 887. Hob. 189.

(5)
Judgment
arrested be-
cause more
Damages re-
cover'd than
ought.
Vid. 1 Saund.
154, 155.
2 Saund. 171.
1 Vent. 10.
Carth. 386.
S. C. call'd
Prince *versus*
Moultin.
2 Mod. 154.
Comb. 442,
443. S. C.
Calcs B. R.
131.
Holt 192.

(6.) East *versus* Essington. Mich. 1 Ann. B. R. Vide *this Case, Title* Bills of Exchange. Vol. 1. Pag. 130. pl. 14.

Crowther *versus* Oldfield. Hill. 4 Ann. B. R. Vide *this Case, Title* Jeofails. Vol. 1. Pag. 364. pl. 5.

(7.) **W**HERE a Verdict will aid a Title defectively set forth but not defective in itself.

Hadley *versus* Stiles. Mich. 9 Ann. B. R.

(8.) **D**EBT on a Bill penal for 300 l. The Defendant pleaded Nil debet, and the Plaintiff took Issue thereon, and the Jury found Nil debet for 200 l. and Debet as to 100 l. M^r. Lutwyche urged, That this Plea, Issue and Verdict were immaterial, and that the Debt could not be apportioned. Et per Cur^{iam}, The Plea was ill, but the Verdict has made it good: We will intend 200 l. paid, and an Acquittance under Seal produced in Proof thereof; and the Jury may as well apportion here as in Debt on a Simple Contract, where they may find Nil debet for Part. Vide Mo. 957. 1 Rol. Rep. 257.

In Debt on single Bill and Nil debet pleaded, the Jury find Nil debet to Part and Debet to the rest, well after Verdict. Vide 1 Mod. 292. 1 Show. 539. 3 Lev. 55. 2 Saund. 255, 308.

V I E W.

Vid. 1 Show.
3.
2 Lev. 117.

Kempster *versus* Deacon. Pasch. 8 Will. III. C. B.

A View is grantable, but that is only where the Title is in Question. (1.)

Anonymus. Trin. 10 Will. III. B. R.

IT was ordered, That when in Order to a View, the last Juroz (2.)
is withdrawn, the Plaintiff shall take out a new Distringas, Method of
amato the last Man of the Panel, to distrain the other twenty. proceeding
three, with an Apponas etiam decem tales. At the Trial of this in Case of a
Cause for Want of a full Jury upon the principal Panel, some View.
Tales-Men were sworn and had the View, but the Distringas was 2 Saund. 254.
returnable as an original Distringas, and so many of the principal 6 Mod. 211,
Panel left out, who were not at the View; of which the Defen- 265.
dant complained, and would have set aside the Trial for Irregu- 1 Keb. 279,
larity; but because no Venire appeared to the Court, and the 418.
Batter stood upon Record as an original Trial, and the Want 3 Keb. 103,
of a Venire was helped by Verdict; and because the Cause was 254, 485.
tried by those that were fittest, viz. those who had the View, the
Court would do nothing in it, but ordered the other Course for
the future.

Anonymus. Mich. 4 Ann. B. R.

PER Holt C. J. Before we make a Rule for a View, the Ve- (3.)
nire facias must be returned, and then we may make a Rule,
that so many of the Panel shall view the Premises.

Villeins

Villeins and Villenage.

Smith *versus* Brown and Cooper.

(1.)
Indebitatus
Assumpsit for
a Negro sold.
Q. Whether
Inheritances,
or not?
S. C. Holt
495.

2 Vent. 4.
Ante 411,
510.
3 Mod. 161.

THE Plaintiff declared in an Indebitatus Assumpsit for 20 l. for a Negro sold by the Plaintiff to the Defendant viz. in Parochia beatae Mariae de Arcubus in Warda Cheape, and Verdict for the Plaintiff; and on Motion in Arrest of Judgment Holt C. J. held, That as soon as a Negro comes into England, he becomes free: One may be a Villein in England, but not a Slave. Et per Powell J. In a Villein the Owner has a Property, but it is as an Inheritance; in a Ward he has a Property, but it is a Chattel real; the Law took no Notice of a Negro. Holt C. J. You should have averred the Declaration, that the Sale was in Virginia, and by the Laws of that Country, Negroes are saleable; for the Laws of England do not extend to Virginia, being a conquered Country, the Law is what the King pleases; and we cannot take Notice of but as set forth; therefore he directed the Plaintiff should amend and the Declaration should be made, That the Defendant was indebted to the Plaintiff for a Negro sold here at London, to that the said Negro at the Time of Sale was in Virginia, and that Negroes by the Laws and Statutes of Virginia, are saleable as Chattels. Then the Attorney General coming in, said they were Inheritances, and transferrable by Deed, and not without: And nothing was done.

Vide 5 Mod.
186, 187.
2 Lev. 201.
3 Lev. 336.

(2.)
Trover lies
not for a Negro;
but in Trespass
quare captivum suum
cepit, Plaintiff
may give in Evidence
that he was
his Negro.

Smith *versus* Gould. Mich. 4 Ann. B. R.

TROVER for several Things, and among the rest de *Æthiope* vocat. a Negro, and on Not guilty pleaded Verdict was for the Plaintiff and several Damages; and as to a Negro 30 l. And it was moved in Arrest of Judgment, that Trover lay not for a Negro, for that the Owner had not an absolute Property in him; he could not kill him as he could an animal. Contra, It was said Property implies the Right of having and enjoying, and disposing; but it does not always imply a Power to destroy; That this Power holds in Beasts, Fowl &c.

fith, which were made the Property of Mankind by the Act of God, and have a natural Existence, but not in Things incorporeal, which consist in jure tantum; for this being a Property ex Instituto only, the Owner has only a Power according to the Pleasure of this instituted Right: And it was instanced in the Case of a Common, a Way and a Ward. On a Ca. Sa. the Plaintiff has an Interest in the Body of the Prisoner as a Pledge, not to sell, but to keep, and it goes to the Executors. Hob. 61. In a Servant to work him; in a Captive to sell him. Reg. 102. F. N. Br. 88. a. B. N. C. 295. Bro. Property 38. 1 H. 6. c. 5. in Rast. 219. Cot. Abb. 460. That the Writ de Nativo habendo must lay the Explees of a Villein in working and taring him at Will. Co. Ent. 406. That by the Law of Moses a Man may be a Slave, and a Slave was a Chattel, his Master's Money, Exod. 20, 21. That by the same Reason there may be a Servus prædialis, i. e. a Villein. One may be a Servus personalis, and that first a Captive and afterwards a Villein. Hob. 97. Brownl. 78. A Villein in Gross is a Chattel, for he is of a perishable Nature, and cannot endure for ever. So is Fitz. Discontinuance 16. Br. Villein 60. As Villeins are regardant to Land, it is a different Thing, and in that respect they are Inheritances, and so are the Charters. Every Villein is intended in Law regardant; the Writ in the Register therefore supposes him to be nativum suum, but before he was a Villein he was a Captive, and then a Chattel. Lastly, It was insisted, That the Court ought to take Notice that they were Merchandize, and cited Cro. 262. The Case of Donkeys, 2 Lev. 201. 3 Keb. 785. 1 Inst. 112. If I imprison my Negro, a Habeas Corpus will not lie to deliver him, for by Magna Charta he must be Liber homo. 2 Inst. 15. Sed curia contra, Men may be the Owners, and therefore cannot be the Subject of Property. Villenage arose from Captivity, and a Man may have Trespass quare captivum suum cepit, but cannot have Trover de gallico suo. And the Court seemed to think that in Trespass quare captivum suum cepit, the Plaintiff might give in Evidence that the Party was his Negro, and he bought him.

Difference between Property in Things having a natural Existence and a civil Existence only. Vide ante 556, 657.

Servus prædialis and personalis.

3 Lev. 336. Hob. 283. Vid. March 12. Raym. 16. Cro Car. 19, 391, 545. Cro. El. 126. 545. Cro. Jac. 262, 463.

V I S N E.

1 Lev. 149.
2 Lev. 237.
Cro. Car. 278.
Raym. 67,
417, &c.

Seaman *versus* Ling. Mich. 6 Will. III. B. R.

(1.)
If the Defen-
dant be a Bar-
rister or At-
torney, he
may change
the Venue to
Middlesex.
See 1 Mod.
64.

2 Show. 242,
176.

1 Vent. 1, 11,
16, 29, 298.

IF the Defendant be a Barrister, he may have the Venue changed to Middlesex. In Trin. 2 Ann. Wilcocks, an Attorney, was sued by Bill of Privilege, and the Action was laid in Suffolk; and upon Motion the Venue was changed into Middlesex; and vide 2 Vent. 47. If an Attorney being Plaintiff lay his Action in Middlesex, the Venue shall not be changed; otherwise if in London.

Anonymus. Pasch. 8 Will. III. B. R.

(2.)
When Mo-
tion to
change the
Venue ought
to be made.

PER Holt C. J. The Motion to change a Venue ought to be within eight Days after the Declaration delivered; but this Rule is not always strictly adhered to. But Trin. 7 W. 3. B. R. It was said by Aston, one might move to change the Venue any Time before Judgment signed, which Holt C. J. denied saying, heretofore it was never granted after the Rules of Pleading were out.

The Duke of Norfolk *versus* Alderton. Pasch.
9 Will. III. B. R.

(3.)
Visne refus'd
to be chang'd
in an Action
of Scanda-
lum Magna-
rum.
Vide 1 Lev.
56, 149.
3 Keb. 39.
1 Lev. 307.
1 Vent. 364.
S. C. Carth.
400.
Cases B. R.
121.

A Motion was made to change a Visne in an Action of Scandalum Magnatum upon the common Affidavit, insisting in my Lord Shaftsbury's Case, 2 Jo. 192, 198. but it was denied for in my Lord Shaftsbury's Case, it was on an Affidavit of the vast Interest he had in the City, and the Unlikelihood of an impartial Trial; but we will not deprive the Plaintiff of that Benefit the Law gives him, of laying his Action where he pleases, to the Convenience of the Defendant. Vide 1 Lev. 56.

Note; At Common Law, all Actions were laid in the proper County, that there might be a Jury de vicineto.

Anonymus. Mich. 10 Will. III. B. R.

IN an Action on the Case against the Drawer of a Bill of Exchange who lived at Bristol, and drew the Bill there, a Motion was made to change the Venue, but it was denied, for the Person upon whom the Bill was drawn, lived in London, and there was the Refusal, and that must be proved to make the first Drawer liable; for where Evidence necessary to support the Action arises in two Counties, the Plaintiff may chuse which he will; and this is the Ground of the Rule, That if the Plaintiff will be bound to give some material Evidence in the County where the Action is laid, the Court will never change the Venue. Et Pasch. 10 W. 3. B. R. In Trover and Conversion the Defendant had Leave to change the Venue, and the Plaintiff moved to set that aside, offering to be bound to give Evidence in the County where the Action was laid: Upon Inquiry the Court found the Plaintiff was Assignee of Commissioners of Bankrupts, and could prove the Assignment in that County. Per Holt C. J. The Whole is transitory: Et per Cur', The Conversion is the Cause of Action; and not the Assignment; and you are in Place of the Commissioners, and the Venue was according to the Rule. And Pasch. 12 W. 3. B. R. it was held, That where a Rule is made to change a Venue, and afterwards the Plaintiff would bring it back again, the Rule must be, dare aliquam evidentiam de materia in exitu, in the County where the Action was brought.

(4.)
Where Evidence necessary to support the Action arises in two Counties, the Plaintiff may lay it in either.
Vide infra.
7 Co. 2, 3, & 7. b.
Raym. 33.
1 Lev. 178, 207, 394.

Dominus Rex *versus* The Mayor of Oxford. Pasch.
13 Will. III. B. R.

IN Case for a false Return, the Action was laid in Suffolk, and the Defendant moved it might be laid in Middlesex; and gave one Reason, That it would raise Heats in the County. The Court inclined to do it, but the Plaintiff insisted and would not consent, and therefore nothing was done; because he had a Right to lay it in either County.

(5.)
Vide supra.
Raym. 33.
Lutw. 345.
5 Co. 2, 3, 4, & 7. b.

Crockett's Case. Trin. 3 Ann. B. R.

S. C. 6 Mod.
175.

THE Plaintiff declared of a Promise in Staffordshire, and the Declaration was delivered in Easter-Term: Chetham moved to change the Venue. Et per Holt C. J. (The Motion being in Trinity-Term) Unless it appears upon the Face of the Declaration, That the Plaintiff was not intitled to a Plea to
Vol. II. L 12 enter,

(6.)

enter, we expect an Affidavit when the Declaration was delivered, that thereby the Court may be ascertained.

Sir Samuel Gerard's *Case*. Mich. 3 Ann. B. R.

(7.)
Vid. 1 Saund.
229.
Raym. 33.

AN Action of false Imprisonment against the Sheriffs of London was laid in Middlesex, and upon the common Affidavit a Rule was made that the Venue should be changed to London; but then it was said that the Officer of the Counter was subject to the Sheriffs, and so there could be no good Trial, for which Reason it was removed back to Middlesex.

Heathcoat's *Case*. Pasch. 4 Ann. B. R.

(8.)
Venue not
changed in
Action a-
gainst a
Lighterman,
&c. for
Goods lost.
Vide 1 Lev.
307.

AN Action against a Lighterman for not delivering Goods was laid in London, where they were to be carried. It was moved to change the Venue, because the Damage and Neglect was in Kent; sed non allocatur; for the Neglect is transitory, and not material where it was, and the Court will never change a Venue for a Carrier, which is the same Case; otherwise perhaps in Deceit, or where there is an actual Mistake. Sed per Holt C. J. Mich. 10 W. 3. B. R. fuit dit, That in an Action of Escape, it is not the Course to change the Venue.

Knight *versus* Farnaby & al'. Pasch. 5 Ann. B. R.

(9.)
Clerk of Af-
fize may lay
his Action in
Middlesex,
and the Ve-
nue shall not
be chang'd.
1 Lev. 207.
1 Mod. 37.
1 Saund. 247.
6 Mod. 82.
1 Sid. 326.
5 Mod. 223.
S. C. Holt
712.
Practice of
changing the
Venue in tran-
sitory Actions
began in
K. James the
First's Time.

MR. Knight, Clerk of Assize of the Norfolk Circuit, brought an Action of Assault and Battery against Farnaby and others, for a Battery committed in Kent, and laid the Action in Middlesex: Upon the common Affidavit the Visne was changed and upon the Motion of Mr. Knight, that Rule was set aside and the Visne brought back again. Et per Holt C. J. In Strictness of Law, an Action for a transitory Matter, as Battery, may be laid any where. If by Law the Place were material, the Defendant might give in Evidence, as he does, in criminal Prosecutions, that the Battery was done in another County: However it is now allowed and become the Course of the Court to change the Venue for the Defendant upon the common Affidavit a Practice which, as he had heard by old Practisers, came first in King James the First's Time; but that Rule had never obtained in Cases of privileged Persons, as Barristers, who are to attend at Westminster; and therefore have the Liberty of laying their Actions in Middlesex: So it was held in the Case of Mr. Thompson against Scroggs. The Plaintiff is an

ter, he is bound to attend the Assizes at Norfolk, and to attend at Westminster to return the Postea's. By the Statute of Westminster Justiciarii habeant Clericos suos irrotulantes; and in Dyer, upon a Question who should return the Postea's in Case both the Justices of Assize died before the Day in Bank, 'twas held the Clerk of Assizes should return them. Therefore he is Clerk to the Judge of Assize, and a Minister here above to attend upon Trials ordered by superior Courts, upon Writs of Nisi Prius issuing out of those Courts. Et per Powel J. The Privilege extends to Judges Clerks, as well as to Serjeants at Law, Barristers, and Attornies, for they are bound to be in Middlesex to attend their Masters, and so is the Clerk of Assize; that the Clerk of Assize was the Clerk of the Judge of Assize; and since the Statute has allowed the Judge of Assize to have a Clerk, they shall not be obliged to return the Postea's themselves, but the Clerk of Assize shall attend at Westminster to return them.

Clerks of Assize are by Stat. Westm.

Universities and Schools, &c.

Hinton *versus* Hern. Mich. 8 Will. III. B. R.

Vide ante 450.

S. C. Cases B. R. 165.

(1.)

Vice-Chancellor's Court cannot hold Plea for a Penalty of a Statute.

HINTON was libelled against in the University Court of Oxford, reciting the Statute of E. 6. and Car. 2. And the Custom of the University to have but four Taverns, and that he sold Wine without their Licence, in Contempt of the Laws of the University and the said Statutes; and because a Penalty is inflicted by the said Statutes, and they cannot hold Plea for such Penalty, a Prohibition was granted.

Matthews

S. C. ante
412.

Matthews *versus* Burdett. Hill. 1 Ann. B. R.

(2.)
Argued whether a Prohibition lay to the Ecclesiastical Court in a Suit for teaching School without Licence from the Ordinary before the Act for preventing the Growth of Schism. Quære. S. C. Salk. 318.

IN a Prohibition the Plaintiff declared, That whereas by the Common Law it was lawful to teach others, and instruct them in any honest Art or Science, and that Teaching est res mere laica, &c. Yet that he was sued in the Spiritual Court for teaching Children in the Elements of Grammar, without Licence from the Ordinary: On Demurrer it was insisted for the Plaintiff.

1st, That the Law favours Means of Livelihood; that Grammar was equally useful to all literate Professions, and that a Lawyer or Physician could be no more without it than a Divine. That all the Colleges in the University were lay Corporations; that tho' the Members of the College might be all of them Spiritual Persons, yet the Corporation was Lay and Temporal; because the Institution and End was Temporal, viz. to advance Learning, which shews that a School-master is a Lay Employment, and was formerly under the Care of the Civil Magistrate. Stillingfleet's Orig. Brit. 210, 212, 213. That the Common Law takes no Notice of it but as Temporal. Vide 11 H. 4. 47. Poph. 170. Reg. 35. And that the only Mention of it before the Reformation, is Anno Domini 1408. Per Lyndewode 282. That School-masters permit not their Scholars to dispute of Religion, under Penalty of being censured for Heresy, to which every Body was liable; which Provision was to prevent the spreading of Wickliffe's Doctrine: That no Law or Canon required a Licence till the Council of Lateran, Anno Domini 1215. Decret 6. Tit. 5. cap. 1, 2, 3. and that is, That there shall be a School-master in every Cathedral, and that he shall be licensed by the Bishop. That the several Acts of Parliament which require the School-master's taking a Licence from the Bishop, shew it was not necessary before, nor was there any such Usage or Practice that can be made appear. Vide Stat. 23 Eliz. c. 2. 1 Jac. 1. c. 4. 14 Car. 2. c. 4.

2dly, That if this was a Calling which a Lay-Man might follow by the Common Law, a Canon cannot restrain him of the Liberty the Law gave him; the Common Law and Custom of the Realm cannot be altered or abrogated, but by Act of Parliament, and therefore a Canon cannot do it, tho' ordained by the King's Royal Licence, or afterwards confirmed by his Royal Authority. Vide 12 Co. 72. 2 Inst. 97, 647, 653, 657. 2 Ro. Ab. 454. Mo. 782. Ratio est, because being a Lay-Man, he is not represented, and therefore his Consent is not given, and a Canon cannot be under the Obligation of a Canon without his Consent express or implied. In the Primitive Church the Laity were pre-

sent at all Synods. When the Empire became Christian, no Canon was ever attempted without the Consent of the Emperors; and his Concurrence included the Assent of the whole Body of the People; because he had the sole legislative Power in him: But this is not the Case of our King; for he has not the whole legislative Power in him: Ergo, his Consent to a Canon in re Ecclesiastica, makes it a Law to bind the Clergy, but not to bind the Laity. Vide 20 H. 6. 13. Br. Ordinary 1. 2 Ro. Ab. 226. 2 Cro. 670. 2 Brownl. 38. Cro. Car. 588. Palm. 379.

3dly, Where the Common Law or a Statute gives a Remedy in foro seculari, whether the Matter be Temporal or Spiritual, the Consuance of that Matter belongs to the King's Temporal Courts only, unless the Jurisdiction of the Spiritual Court be saved by that Statute which gives the Penalty; for otherwise one might be twice punished for the same Thing. Vide Lit. Sect. 136, 137. Cro. Car. 229. 1 Mod. 21, 22. 1 Jon. 320. Where a Crime which was punishable in the Ecclesiastical Court, is made Felony, their Jurisdiction is gone. For Note; The Nature of the Crime is altered. So 2 Leon. 53. 4 Leon. 92. That in this Case the Act of Parliament which gives a temporal Penalty, does not save the Jurisdiction of the Spiritual Court; which was urged as an Argument that the Parliament did not look upon it as an Ecclesiastical Matter; for in all Cases where Acts of Parliament have imposed farther Penalties in Ecclesiastical Offences, there is a Saving added for the Jurisdiction of the Ecclesiastical Court; so is 13 Eliz. cap. 5. Of Usury, 31 Eliz. c. 6. Of Simony. 4 Jac. 1. Of Drunkenness, 3 Car. 1. c. 1. Of the Observation of the Sabbath. 3 Jac. 1. c. 4. Of Recusancy. And they urged also that these Parliaments had not added these Savings, if they had been useless; but it was their Opinion, That imposing a Penalty made it a Temporal Offence, and that their Jurisdiction would have been lost without such a Saving. And lastly this Difference was taken, That where an Act of Parliament gives a Remedy for a Spiritual Matter in the Temporal Courts, the Spiritual Jurisdiction is gone; but where an Act gives a Remedy in a Temporal Matter to be prosecuted in the Spiritual Court, yet the Remedy at Common Law remains, as pro violenta injectione manuum in Clericum. Note; In the Statute de circumspecte Agatis, the Words are, commissum fuit alias, which must be understood of a Jurisdiction before granted to them.

On the other Side it was said, That the Canon of Lateran before mentioned, was received in England as well as the other Canon of the same Council for Parochial Churches, and that it appears by Custom, that the Bishop is to superintend the Education of Youth. Vide Lyndew. l. 5. tit De Magistris, and the several Statutes, requiring that he shall have a Licence from the Ordinary: And it was said, That the Toleration Act did not influence

fluence this Case, for that did not exempt Men in Places of Trust from qualifying themselves according to the Rites of the Church of England.

Vide 3 Cro.
64, 65.
5 Co. 119.
2 Lev. 184,
243.

Void and Voidable.

Hall *versus* Biggs. Trin. 2 W. & M. B. R.

(1.)
Where an
Order of Ju-
stices is not
void but
voidable.

IN Debt on a Bond, with Condition to stand to and perform the Order of the Justices, the Defendant pleaded they made no Order; the Plaintiff replied and set forth the Order. The Defendant demurred, pretending it was a void Order, and that he was not bound to perform it, comparing it to the Case of an Award; but the Court did not think them alike; for the Order being a judicial Act is not absolutely void, but voidable, and continues an Order till avoided.

Prigg *versus* Adams & al'. Mich. 4 W. & M. B. R.

(2.)
Judgment of
a superior
Court is only
voidable.
Vide 2 Lev.
184 & 243.
3 Lev. 23.
S. C. Carth.
274.
Skin. 350,
366, 407.
Holt 182.

2 Sid. 125.
Raym. 73.

IN Trespass and false Imprisonment, the Defendant justified an Officer under a Ca. Sa. on a Judgment in the Court of Common Pleas upon a Verdict for 5 s. for a Cause of Action arising in Bristol. The Plaintiff replied, and set forth the private Act of Parliament for erecting the Court of Conscience in Bristol, wherein was a Clause, That if any Person bring such Action in any of the Courts at Westminster, and it appeared upon Trial to be under 40 s. that no Judgment shall be entered for the Plaintiff; and if it be entered, that it shall be void. Upon Demurrer the Question was, Whether the Judgment was so far void, that the Party should take Advantage of it in this collateral Action? And the Court held that it was not; but that it was only voidable by Plea or Error; as where one is taken on Duellum and hath no Addition; (Vide 7 H. 5. c. 5. 8 H. 6. c. 1. Bend. 14, 88, 122, 132. 1 Inst. 259. Dy. 214. 5 Co. 119.) and said it was not like the Case of a Judgment vacated.

Thompson *versus* Leach. Hill. 9 Will. III. B. R. S. C. ante 427, 465, 476.

BOND of an Infant or Non compos is void, because the Law has appointed no Act to be done to avoid them; and the only Reason why the Party cannot plead Non est factum, is, because the Cause of Nullity is extrinsick, and does not appear on the Face of the Deed. (3.) Bond of an Infant, or Non Compos, is void.

Uses and Trusts.

Vide ante 590. Lutw. 824. Vaugh. 50.

Davies *versus* Speed. Hill. 3 W. & M. B. R. Rot. 261. S. C. 4 Mod. 153.

HUSBAND leased in Right of his Wife: Husband and Wife covenant to levy a Fine to the Use of the Heirs of the Body of the Husband on the Wife begotten, Remainder to the Husband in Fee. They have Issue, the Wife dies, the Issue dies, and the Husband dies; and now the Question in Ejectment was, Whether the Heir of the Husband, or the Heir of the Wife should have the Lands? Et per Cur'.

S. C. 4 Mod. 153. 5 Mod. 143. Parliament Cases, 104.

1st, Here can be no Estate for Life to the Husband by Implied Limitation; because the Estate was the Wife's, to which he is a Stranger.

(1.) Husband and Wife covenant to levy a Fine of the Wife's Land to the Use of the Heirs of the Body of the Husband on the Wife begotten, the Limitation is void. Q. 5 Mod. 153.

2dly, This Limitation to the Heirs of the Body of the Husband, &c. was meerly void; for taking it as a Remainder, there is no precedent Estate of Freehold to support it; and taking it as a springing Use, then it is a springing executory Use, to arise after a dying without Issue, which the Law will not expect; so that it is either Way void, and yet must be one of them: But in this Case the Chief Justice held, That a Feoffment to the Use of A. and his Heirs, to commence four Years from thence, was good as a springing Use, and that the whole Estate remained to the Feoffor in the mean Time; so it is if it were to commence

Q. 5 Mod. 153. S. C. Carth. 262, 354. 3 Cro. 334. 1 And. 328. 4 Leon. 293. 1 Vent. 372. 4 Mod. 380. 1 Vent. 272. 2 Lev. 75. Holt 730. Skin. 351. Cases B. R. 38.

Vol. II.

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after

1 Mod. 98, after the Death of A. without Issue, if he die without Issue with-
121, 150, 237. in twenty Years.

Ld. Anglesey *versus* Ld. Altham. Pasch. 8 Will. III. B. R.

(2.)
Fine levied
and Common
Recovery
suffered,
wherein Co-
nusee was
Tenant, and
no Uses of
the Fine de-
clared. In-
tended to be
to the Use of
the Conusee,
in order to
make a Ten-
nant of the
Freehold.
Vide infra,
& prox. pag.
Lutw. 273.
2 Vent. 361.
S. C. Rep.
Eq. 16.
Rep. A. Q.
210.
Holt 733,
736.

UPON the Trial of this Cause at Nisi Prius in Middlesex, before Holt C. J. a Case was made for the Opinion of the Court, viz. H. levied a Fine, and afterwards suffered a Common Recovery, wherein the Conusee was Tenant, and there being no Deed in the Case, it was objected, That the Use of the Fine resulted to the Conusor; and tho' the Intent of the Fine might be to make a Tenant to the Præcipe, yet no Use or Trust can be averred since 29 Car. 2. c. 3. Sed non allocatur; for at Common Law the Use was always intended to be to the Feoffee or Conusee, and in pleading, never was averred. Co. Ent. 114, 273. Plowd. 477. But if it be to the Use of the Feoffee or Conusor, then it must be averred.

2dly, The Court held the Party was in by the Fine immediately, and so there was a good Tenant to the Præcipe.

3dly, The Statute extends not to Uses by Operation of Law, but to such Uses as are to a third Person, and that neither the Conusor nor the Conusee could aver the Fine to the Use of a third Person since the Statute.

Tregame *versus* Fletcher. Hill. 8 Will. III. B. R.

(3.)
Where the
Uses of a Re-
covery are
declared by
a Deed sub-
sequent, the
Pleading
should be ge-
neral, that
the Recovery
was to such
Uses.
Vide prox.
pag.
Where Uses
may be a-
verred by Pa-
rol, and
where not.
Vide 1 Salk.
75.
2 Co. 77.
Lutw. 273.
1 Sid. 160.
6 Mod. 82.
1 Lev. 113.
2 Vent. 242.
S. C. 3 Salk.
302.
Comb. 403.

ERROR of a Judgment in the Grand Sessions of Wales, in Replevin, where the Defendant made Conusance, That A. was seised in Fee-tail, and suffered a Common Recovery; and that by Deed made at a Time subsequent, 'twas agreed the Recovery should be to the Use of B. for the Security of a Rent-Charge, and that Rent was Arrear, for which he distrain'd. Judgment was for the Avowant. Holt C. J. held, 1st, That it was not well to plead the Uses were declared by a subsequent Deed; but he should plead, Quod recuperatio habita fuit, &c. quæ quidem recuperatio in forma prædict. habita fuit to such and such Uses.

2dly, He held, That where the Uses of a Recovery are declared by Deed precedent, no new or other Use can be averred by Parol, unless there was some Variance between the Deed and the Recovery; and that in Case of a Deed precedent, if the Party set up other Uses, he must confess and avoid: But where they are by Deed subsequent, new or other Uses may be averred without shewing the Deed, tho' there be no Variance, &c. because there was an intermediate Time when there might be such Agreement made, and the Uses arise by the Recovery according

to that Agreement; and if a Deed sublequent be set up, the other may traverse those Uses. Adjournatur.

Jones *versus* Morley. Hill. 9 Will. III. B. R.

UPON a Special Verdict in Ejectment it was found, That Bowyer being seised in Fee, in Consideration of Marriage, by Indenture of Lease and Release conveyed to A. and B. to the Use of her self in Fee, till the intended Marriage with Edward Morley should take Effect, and until the said Morley should settle upon her a Jointure of 300 l. per Annum, and then to the said Morley and his Heirs: The Marriage took Effect, and on the 29th Day of January 1665, they covenanted and agreed to levy a fine next Hillary-Term; and the Use thereof was declared by the same Deed to be to E. Morley and his Heirs. Afterwards, viz. the 31st Day of the same Month, by Indenture between the Husband and Wife, it was agreed and declared, That the Uses of the Deed of the 29th should be revoked. After this, the same Hillary-Term, a Fine was levied; and this Writing of the 31st being no Deed, it was resolved,

1st, That by the Agreement of the 29th, the Parties meant a fine to be levied Hillary-Term come twelve Months, and not the Hillary Term then current, and therefore this Fine was not pursuant to that Covenant.

2dly, That if the Fine had been levied pursuant to that Covenant, no parol Averment could have been allowed to declare other Uses, or that the Fine was not to the Uses of that Deed, and all Parties had been estopped to aver the contrary by Parol; but by Deed sublequent, and before the Fine, other Uses may be averred.

3dly, That since the Fine is not according to the Deed, other Uses may be averred, tho' they were declared by Writing, and not by Deed; for by the Variance there is Room and Occasion given to inquire and receive Information, that the old Agreement was relinquished; and by the same Reason the Use of a Fine may be declared by Parol upon an original Agreement, it may now, as in this Case, where the original Agreement was relinquished: Yet without such Averment the Fine shall be intended to the Use of the first Agreement, notwithstanding the Variance.

4thly, That this is a good Revocation of the Uses of the first Deed, tho' it be but a Writing; for where the Conveyance enures by Way of Transmutation, the Use is according to the Intent of the Party, and 'tis no Matter how that Intent is manifested, so as it may be known; but where the Conveyance is by Way of Covenant to stand seised, there must be a valuable Consideration, or a binding Agreement by Deed.

(4)
Where a Conveyance to Uses enures by Way of Transmutation of Possession, the Uses may be declared or revoked without Deed.
Vide 2 Lev. 77.
1 Co. Reſtor of Chedington.
S. C. Carth. 410.
4 Mod. 261.
2 Lev. 149.
2 Keb. 366.
Raym. 259.
Show. Parl. Caf. 140.
1 Vent. 278.
368.
2 Rol. Abr. 749.
2 Rep. 71. b.
1 And. 126.
Dyer 306.
1 And. 240.
Moor 789.
2 Rol. Abr. 251.
Bridg. 112.
S. C. Comb. 429.
Cases B. R. 159.
Holt 321.

S. C. Farell.

71.

3 Salk. 386.

Holt 621.

Vide post. pl.

7.

(5.)

If a Lease

and Release

be pleaded to

A. and his

Heirs, and

no Consideration ap-

pears, nor

said to whose

Use it was, it

shall be in-

tended to be

to the Use of

the Releasee

and his Heirs.

Dyer 146.

Shortridge *versus* Lamplugh. Mich. 1 Ann. B. R.

H Brought Covenant as Assignee of a Reversion, and shew-
ed, That the Lessor in Consideration of 5 l. bargained and
sold to him for a Year, and afterwards released to him and his
Heirs, *virtute quarundam Indentur' barganiæ venditionis & relaxa-*
tionis necnon vigore Statuti de usibus, &c. he was seised in Fee:
And it was objected, That the Use must be intended to be to the
Relessee and his Heirs, because no Consideration of the Release
nor express Use appeared by the Pleading; so that without confi-
dering the Operation of the Conveyance, the Question was upon
the Pleading, Whether the Use shall be intended to the Relessee,
unless it be averred to be to the Releasee? Et per Holt C. J.
to which the rest agreed,

This Way of Pleading was certainly good before the Statute
27 H. 8. so is Plowd. 478. and many Precedents in Co. Ent. of
Feoffments averr'd in the same Manner; for the Use was a Matter
that was extrinſical to the Deed, and depended upon collateral
Agreements at Common Law, and then the Use might, as since
the Statute of Frauds by Writing, be averr'd by Parol, and
therefore in pleading the Conveyance was taken to the Use of
him to whom the Conveyance was made, till the contrary ap-
peared; if it were otherwise, it ought to come on the other
Side; and 27 H. 7. has not altered the Course of Pleading,
which is rather confirmed by the Statute; because, if now the
Use be construed to be to the Relessee or Feoffee, the Convey-
ance will be to no manner of Purpose, it being still the old Estate
to which the old Warranty and other Qualities remain annexed,
whereas before the Statute there might be some End in making
the Feoffment, viz. to put the Freehold out of him and prevent
Wardship; and Co. Lit. goes no farther, than where there is a
Feoffment to particular Uses and Estates, the Residue of the
Use shall be to the Feoffee, which is reasonable; for the raising
those particular Estates appears a sufficient Reason for the Con-
veyance. And Powel J. doubted, Whether there could be a re-
sulting Use on a Lease and Release, unless where particular Uses
are limited; for this Way of Conveyance is grounded on the an-
cient Way of Releasing at Common Law, wherein there was a
Merger of Estate, which is a good Consideration, as where the
Lessor confirms to the Lessee and his Heirs. In Error of a Judge-
ment of C. B. which was affirmed.

Q. Whether
there can be
a resulting
Use upon a
Conveyance
by Lease and
Release?
Vide 1 Lev.
30.
2 Lev. 77.

Broughton *versus* Langley. Hill. 1 Ann. B. R.

Vide 1 Chan.
R. 176.
Lutw. 823.

ONE seised of Lands in Fee, devised them to Trustees and their Heirs, to the Uses, Intents and Purposes herein after mentioned, viz. to the Intent and Purpose to permit A. to receive the Rents and Profits for his Life, and after that the Trustees should stand seised of the Premises to the Use of the Heirs of the Body of A. with a Proviso, that A. with the Consent of his Trustees, might make a Jointure for his Wife; and the Question was, Whether A. had an Estate-tail executed, or not? And it was adjudged he had. Holt C. J. pronounced the Judgment of the Court, and gave these Reasons: 1st, That this would have been a plain Trust at Common Law, and what at Common Law was a Trust of a Freehold or Inheritance is executed by the Statute, which mentions the Word Trust as well as Use; and the Case in 2 Vent. 312. Burchet and Durdant, is not Law; and that the Change of Expression in the principal Case by using the Word permit in the first Clause, which are Words of Trust, and afterwards making Mention of a Use, is immaterial, in regard Trusts at Common Law and Uses are equally executed by the Statute.

2dly, 'Twas held, That a Power to make a Jointure, does not necessarily exclude an Estate in Tail, or an Intent to give it; because Tenant in Tail, without discontinuing or barring the Tail, cannot make a Jointure; and so this Power has its Use.

(6.)
Devise to Trustees and their Heirs, on Trust to permit A. to take the Profits for his Life, and afterwards to stand seised to the Use of the Heirs of A.'s Body, is a Use in A. and he has a Tail.
S. C. Eq. Ab. 383. p. 3.
1 Lutw. 814.
Holt 708.
2 Vent. 311, 312.
Whatever was or would have been a Trust at Common Law, is since the Statute a Uses executed.
1 Vent. 232.

Adams *versus* Tertenants of Savage. Hill. 1 Ann. B. R.

S. C. 1 Salk. 40. & ante 601.

IN a Scire facias on a Judgment against Tertenants, it was found by Special Verdict, That one Savage being seised in Fee, conveyed by Lease and Release to Trustees and their Heirs, to the Use of himself for 99 Years, Remainder to the Use of the Trustees for twenty-five Years, Remainder to the Heirs Male of his own Body, Remainder to his own right Heirs; the Question was, Whether Savage was Tenant in Tail, or only Tenant for Years? And the Court held the Limitation to the Heirs Male of the Body to be void, because there was no preceding Estate of Freehold limited to support it; and it shall not be implied contrary to the Intent of the Conveyance; and if it could be implied, it must be out of the Estate given to the Heirs of the Body, which cannot be, because this is a new Use; where a resulting Use is always from the old Estate, and Parcel of the old Use; and here the Estate takes Effect by Transmutation of Possession out of the Seisin of the Trustees; and not like Fen-

(7.)
Lease and Release by A. to Trustees and their Heirs to the Use of A. for 99 Years, Remainder to the Use of the Trustees for 25 Years, Remainder to the Heirs Male of A.'s Body: Remainder to the Heirs Male, is void, for want of a Freehold.
1 Chan. Rep. 239.
6 Mod. 134, 199, 226.
3 Salk. 321.
Holt 179.
Lilly Ent. 398.

wick

Mod. Caf.
134, 199,
226.
Farell. 15.

wick and Milford's Case, where the Owner covenanted to stand seised to the heirs of his Body: And yet per Powel J. Even in that Case, if there had been an express Estate limited to the Covenantor, it had been otherwise.

Pye versus George. Mich. 9 Ann. In. Canc'.

(8.)
Trustees join
to bar a con-
tingent Re-
mainder, it
is a Breach
of Trust.
Cro. Car. 312.
1 Chan. Rep.
28, 296.

TRUSTEES appointed to preserve contingent Remainders did join in a Conveyance to destroy the Remainder before a Son was born; and this was decreed a plain Breach of Trust, and that whoever claimed under this Conveyance, having Notice of the Trust, or by a voluntary Settlement, should be liable to make good the Estates. Per Harcourt, Lord Keeper.

Cro. Jac. 104.
509.
Cro. Car. 283,
253.
1 Leo. 54.
1 Hawk. cap.
68 & 82.

Usury and Extortion.

Domina Regina versus Smith. Pasch. 4 Ann. B. R.

(1.)
Justices of
Peace have
not Juris-
diction upon
the Statute
of Usury.

INDICTMENT was at the Sessions before the Justices of the Peace at Hicks's Hall for Usury, contra formam Statuti and Judgment was against the Defendant, upon which Writ of Error was brought in B. R. and the Judgment reversed; for the Justices of the Peace have no Jurisdiction in the Case.

Domina Regina versus Baynes. Pasch. 5 Ann. B. R.

(2.)
Charge of
Extortion
ought to be
particular,
and lay the
Defendant
took it ex-
tortive.
S. C. 6 Mod.
192.
Holt 512,
514.

UPON a Certiorari this Order was removed, Whereas Complaint in Writing at this Sessions, exhibited to the Court against R. B. Clerk of the Peace, R. B. was charged with divers Misdemeanors in his Office, viz. That he exacted of one A. the Sum of 8 s. for a Subpoena, and did compel one to pay him 9 s. more than his due Fee; and it doth appear upon Evidence, That the said R. B. misdeameaned himself in his Office.

by extorting of the said A. by Colour thereof 5 s. more than was due, and of the said B. 9 s. more than was due; this Court doth discharge and remove him from the said Office of Clerk of the Peace.

Note; By 1 W. & M. Sess. 1. cap. 21. sect. 4. If any Clerk of the Peace do misdemean himself in his Office, and thereupon a Complaint and Charge in Writing of such Misdemeanors be exhibited against him to the Sessions, the Sessions shall discharge him. It was agreed by all, That if here was not a Charge of Extortion against R. B. then he was not removed; for the Justices have only a Special Authority to execute as the Statute appoints, and the Act shall be construed strictly, because it deprives the Defendant of the Benefit he has by Magna Charta, of being tried per Pares. The Justices of the Queen's Bench being divided, it was adjourned into the Exchequer-Chamber, where Gould and Powys Justices, Smith Baron, Ward C. B. and Trevor Chief Justice of the Common Pleas, held this a good Charge of Extortion, by Reason of the Viz. which particularizes the general Charge, and incorporates what follows after it with what went before it. Cited 2 Brownl. 151. 1 Vent. 37. West's Preced. 97, 130. 1 Sid. 91. 1 Keb. 357. Holt C. J. Powell and five more Justices contra. Before the Viz. all was mere Recital and also general, and no general Charge is by Law allowable in any Case but Barrettry, which in its Nature must consist of a Heap and Multitude of Particulars; but that in this Case it ought to be certain and positive; because he is charged with Misdemeanor, and ought to know what he is to answer to; he is not only to be fined, but to lose his Freehold; and where a Man is to lose any Part of his Property, he must have a certain Charge against him; the Act requires the Cause of Removal should be in Writing, that the Cause may appear, and that he may have the Benefit of Appeal; and these Articles are in the Nature of Informations; That what went before the Videlicet being only Matter of Recital, and a kind of Title to the Articles, the Charge begins at the Videlicet, and then it does not appear that these Misdemeanors relate to his Office: It is not said that he took those Sums extorsive & colore officii, and a Man cannot be charged for Extortion without charging him with asking extorsive, which are Words as necessary as Proditorie & Felonice. In this Case non constat but 8 s. was his Fee. The Charge could have been, either that 3 s. was his Fee; and that he colore officii sui extorsive took 8 s. or generally, That he colore officii sui injuriose & extorsive took 8 s. pro. feodo, &c. Lastly, They held, That what followed upon Evidence before Justices, does not help; because 'tis no Part of the Charge: the Order quashed. Note; This Report is only of the Part of what was said in R. B.

In Convictions what appears upon Evidence will not supply the Defects of the Charge.

Note; The Stat. of Usury is not pleadable to a Bottomry-Bill or Bond, &c. 1 Lev. 54. 2 Lev. 7. 1 Show. 8. Wager

Wager of Law.

1 Leon. Caf.
540.
2 Leon. Caf.
143.
Cro. El. 790.
3 Leon. Caf.
55.
2 Infl. 45.

Anonymus. Trin. 11 Will. III. B. R.

(1.)
Method of
performing
Wager of
Law.
2 Vent. 171.

Bro. Non-
suit 1.

ACTION of Debt was brought on a By-Law; the Defendant waged his Law, and a Day was given upon the Roll for him to come and make his Law; and not upon the last Day of the Term he came: And North for the Plaintiff insisted, That if he swear falsely or rashly, and without Reason, the Court is not bound to receive him to it and prayed a Day to speak to that Point. Sed per Holt C. J. We can admonish him; but if he will stand by his Law, we cannot hinder it, seeing it is a Method the Law allows; and the Defendant was set at the right Corner of the Bar, without the Bar, and the Secondary asked him, If he was ready to wage his Law? he answered, Yes; then he laid his hand upon the Book and then the Plaintiff was called; and a Question thereupon arose, Whether the Plaintiff was demandable? And a Divers taken where he perfects his Law instanter, and where a Day is given in the same Term, and when in another Term: As to the last, they held he was demandable, whether the Day given was in the same Term or another: Then the Court admonished him and also his Compurgators, which they regarded not so much as to desist from it; accordingly the Defendant was sworn, That he owned not the Money modo & forma, as the Plaintiff had declared, nor any Penny thereof. Then his Compurgators standing behind him, were called over, and each held up his right hand, and then laid their hands upon the Book, and swore, That they believed what the Defendant swore was true. Per North This will be a Reason for extending Indebitatus Assumpsits further than before. Holt C. J. We will carry them no farther.

Note; This seems to be the Case mentioned Pl. 2. to have happened in B. R. about two Years before, and not to be Law.

Mood *versus* The Mayor of London. 2 Martii 1701.
At Guilhall Chamber.

S. C. 1 Salk.
397.
Holt 740,
369.
Vide 2 Lev.
106.

IN Debt for the Penalty of a By-Law the Defendant waged his Law; and it was over-ruled in the Court of the Lord Mayor, and a Commission of Error sued out before Holt C. J. Ward Chief Baron, and other Commissioners. Et per Holt C. J. Debt on a By-Law made by a Corporation, is founded on the Wrong of the Party in not submitting to the Order of the Government of the Corporation, and it arises from his Contempt and Disobedience, and in such Cases no Wager ought to be allowed: So it is in Debt for an Escape, for it supposes a Wrong, and the Action lies not against the Executors: So it is in Debt for Substraction of Tithes: So it is in Debt against an Executor on a Devastavit, because it supposes a Wrong, and therefore the same Action lies not against the Executor of the Executor.

(2.)
Wager of Law lies not in Debt on a By-Law, nor any Action where a Wrong is supposed.
1 Show. 75.
3 Keb. 337.
2 Lev. 142,
174.
9 Co. 87, 88.
1 Lev. 15.
2 Roll. Abr. 106.

By Common Law, if a Contract was secret and wanted Witnesses, it was a Privilege on the Plaintiff's Side as well as the Defendant's; for if the Contract was secret, the Plaintiff had the Privilege of putting the Defendant to his Oath. This appears from Magna Charta. Nullus ballivus ponet aliquem ad legem manifestam, nec ad sacramentum simplici loquela sua sine testibus fidelibus. Before this, the Plaintiff, on his Declaration upon bare Affirmance, might make the Defendant swear there was nothing due. At this Day, if the Plaintiff produce Witnesses to prove his Demand, the Court may put the Defendant to wage his Law; and in such Case the Defendant is not at liberty to cross-examine, no more than where the Plaintiff in a prohibition produces Witnesses to prove his Suggestion.

No Wager lies but where the Debt arises from a simple Contract that is secret, and not where the Action is founded on any thing that is notorious. In Account, if the Receipt was by the Defendant, the Defendant may wage, not if by the Hands of a third Person: It is true, the Law is otherwise in Detinue on Bailment; for tho' the Bailment was by the Hands of a third Person, the Defendant may wage his Law; but here the Bailment is not traversable, but the Detainer, and that is the Point of the Action, and the Redelivery might be private.

Wager lies in Account if he received of the Plaintiff, not of a Stranger. And in Detinue, whether his Receipt was of the Plaintiff or a Stranger.

In Debt on an Arbitrament (I intend where the Submission is by Parol) the Defendant may wage his Law; because, the Arbitrators, who are Strangers, are concerned, yet the Submission might be secret; and that is the Foundation from whence the Debt arises.

In Debt for Arbitrament.

In Debt for an Amercement in a Court-Baron, the Defendant may wage his Law; the Reason is, because the Matter is of small Value which concerns the Lord only; transacted in Pais,

In Debt for an Amercement in a Court-Baron.

But not on
a Judgment
in a Court-
Baron.
2 Mod. 140.
2 Vent. 171.

which might be without his Knowledge: But in Debt on a Judgment in a Court-Baron, the Defendant cannot wage his Law; for the Judgment could not be but by Confession or Admittance, and it was in a proper Court; all which the Defendant cannot by his bare Oath falsify; and the Authorities to the contrary are not Law; And so it is in Debt on a Judgment in a Court of Ancient Demesne. Br. Ley gager 11, 34.

Lies not in
Debt for
Rent, and
the Reason.

In Debt for Rent on a Lease-Parol, the Defendant cannot wage his Law, because his Occupation is notorious, which is a better Reason than because it savours of the Realty; and so it is in Account against a Bailiff for the same Reason, his Management and Transaction being notorious.

Not in Debt
by a Gaoler
for Meat and
Drink.

In Debt brought by a Gaoler against his Prisoner for Meat and Drink, the Defendant cannot wage, not because the Gaoler is obliged to find him Viaticals; that is not true, as appears by Plowd. 68. a. but because the Defendant is in Durance, and the Plaintiff cannot take Security from him for Repayment; for Bond will be void, so that he must be content with a Promise. And he did not deny the Case of 9 Co. 87. b. 88. a. which was Debt by a Labourer; it is but just that the Plaintiff should prove he was retained, rather than that the Defendant should be permitted to wage his Law.

In Debt on a By-Law made by a Company, the Defendant in a Case cited to be in B. R. about two Years before, waged his Law; but Holt C. J. said it was, because the Counsel for the Plaintiff did not challenge it; for he wondered at it then; but this is not so strong as Debt on a By-Law by a Corporation for this obliges all Strangers without Notice; but the other only their own Members, till Notice: And the Chief Justice denied the Case in Co. Ent. 118. and the Case 2 Ro. Ab. 106. Pl.

Note; A Bailiff may not wage his Law, but a Receiver may. Cro. El. 790.

WARRANTY.

Vide 2 Inst.
276.
1 Co. 1.
Cro. Car. 483.
Cro. El. 72.
Lutw. 853.
Stat. 4 & 5
Ann. c. 16.

Smith *versus* Tyndal. Pasch. 4 Ann. B. R.

IN Ejectment, a Case was made for the Opinion of the Court: Maximilian Taylor being seised in Fee made his Will in the Year 1674, and thereby gave several personal Legacies; and amongst others, four Coats to four poor Boys of the Parish of J. S. for ever; and then he devised all his Lands, Tenements and Hereditaments whatsoever, and likewise all his Goods, Chattels, Money, and personal Estate, to Margaret his Wife, and her Assigns, and made her Executrix, and left 1000 l. personal Estate. Margaret married Archibald Tyndal, and they two by Indenture covenant to levy a Fine to the Use of them two for their Lives, Remainder to Archibald and his Heirs with Warranty, and accordingly a Fine was levied.

1st, The Court held this Devise to Margaret was a Fee, because it was subject to a perpetual Charge.

2dly, That in Case it was not, yet that the Heir of Margaret was bound by this collateral Warranty.

3dly, That tho' a Cestuiq; Use is in the Poss, and not in the Fee, yet he may take Advantage of a Warranty annexed to his Estate, according to Lincoln College's Case; ratio est, because by the Statute of Uses, the Estate in Law in Possession is transferred to his Use, and he is Tenant of the legal Estate, and has all Advantages that the Tenant had before to defend his Estate; therefore he may rebut, for that is to defend; but he cannot vouch, for that is to recover in Value for the Loss.

4thly, The Court held, That the Plaintiff in Ejectment may make Title by a collateral Warranty, and give it in Evidence as his Title, according to 10 Co. 97. So if a Disseisor dies after 20 Years quiet Possession, and the Disseisee enter, the Heir may maintain an Ejectment, for the Right of Possession belongs to the Heir, tho' the meer Right be in the Disseisee: So if a Man enters by Wrong and disseises another, and continues twenty Years in quiet Possession, yet in these Cases, if a Writ of Right be brought, and the Dife joined upon the meer Right, the Verdict must be for the Plaintiff, notwithstanding the Statute of Limitations in the one Case or the collateral Warranty in the other.

Rights of Entry are bound by collateral Warranty. Vide Stat. 4, 5 Ann. c. 16. Warranty binds, not extinguishes a Right.

5thly, That Rights of Entry are bound by collateral Warranty as well as Rights of Action.

6thly, That no Warranty extinguishes a Right, but only binds or bars it as long as the Warranty continues in Force; for if the Warranty be released, the ancient Right revives. Litt. §. 708.

Vid. Cro. El. 694.
9 Co. 28.
1 Keb. 509.

Waifs, Estrays, &c.

Henly *versus* Walsh. Mich. 4 Ann. B. R.

Owner of a Stray may seize it, tendering Satisfaction. S. C. 3 D. 282. D. p. 2. 284. p. 2, 3. Rep. A. Q. 89. Holt 563.

TRESPASS for his Horse: Defendant pleaded, That one Pooley was Owner of the Horse, and that the Horse estrayed out of his Possession, and came to the Hands of the Plaintiff, and that he by Command of Pooley demanded the Horse within a Year, &c. and tendered Amends; and that the Plaintiff refusing to deliver him, he took him. To this there was a frivolous Replication, and upon that a Demurrer. Et per Cur,

1st, Without telling any Marks or making any Proof of Property (which may be done upon the Trial) the Owner may seize his Horse where he finds him. Vide Co. Ent. 40, 170. b. Rast. 680. 7 H. 6. 2. 44 E. 3. 14. Br. Estray 1.

And 2dly, Tho' the Defendant does not plead directly that he tendered Amends, but only that he demanded the Horse proferendo Satisfaction; yet the Court held this a direct Affirmation, like the Case of Warrantizando vendidit; where the Participle affirms as directly as a Verb; so dans plagam mortalem is too enough. Vide 2 Cro. 630. 4 Co. Long's Case.

And in Pleading it, he need not shew a certain Sum.

3dly, The Court held, That tho' it was said he tendered Amends generally, and did not express any certain Sum, yet that was good in this Case; and a Difference was taken between this Case and that of a Tender of Amends for a Trespass. In the Case of a Trespass if the Defendant pleads a Tender of Amends, he must shew what he tendered; for he must Tender a certain Sum and the Law puts this Difficulty upon him, because he is the Wrong-doer, and the other is confessedly a Party injured: To

the Owner of the Stray is no Wrong-doer, and it is impossible he should know how long his Horse had been in the Lord's Custody, nor how much will make a proper Satisfaction.

Another Exception was, That the Defendant does not aver the Amends tendered was refused. Et adjournatur. Vide Cro. El. 888, 889. 1 Ro. Ab. 879. 2 Ro. 92. 1 Sid. 13.

Weights and Measures.

Vide Stat. 8
Ann. c. 18.
Lamb. 356.
Dalt. 146,
155.
Baker's
Chron. 43.

Dominus Rex *versus* Flint. Mich. 10 Will. III. B. R.

THE Defendant was indicted for not making his Bread of lawful Weight, and demurred to the Indictment; and Mr. Buxton took Exception, That it was only *debitum pondus minime habens*, not shewing how much *debitum pondus* was, and what was wanting; and this was agreed to be a fatal Exception by Holt C. J. And whereas it was said the Demurrer had confessed a Deficiency, the Court held the Demurrer confessed nothing but what was well pleaded.

In Indictment for making light Bread, it is not enough to shew that it had not due Weight, without shewing what is due Weight.
S. C. Cases
B. R. 242.

Wills

Vide ante
570. & Tit.
Revocation
592.

Wills and Testaments.

Shires *versus* Glascock. Pasch. 3 Jac. II. C. B.

The Attestation good within the Statute of Frauds, if the Testator might see the Witnesses sign, if he pleas'd.
S. C. Eq. Ab. 403. p. 8.
Carth. 81.

UPON a feigned Issue, the Question was, Whether the Will was made according to the Statute of Frauds? For the Testator had desired the Witnesses to go into another Room, seven Yards distant, to attest it, in which there was a Window broken, thro' which the Testator might see them. Et per Cur', The Statute required attesting in his Presence, to prevent obtruding another Will in Place of the true one: It is enough if the Testator might see, it is not necessary that he should actually see them signing; for at that Rate if a Man should but turn his Back or look off, it would viciate the Will. Here the Signing was in the View of the Testator; He might have seen it, and that is enough. So if the Testator being sick should be in Bed and the Curtain drawn

WIT

WITNESSES.

[Vide Title Evidence and Proof, p. 555.]

Dominus Rex *versus* Crosby. Pasch. 7 Will. III. B. R.

S. C. 5 Mod.

15.

3 Lev. 426,

427.

Skin. 578.

Holt 753.

Case, B. R. 72.

(1.)

3 Salk. 461.

5 Mod. 74, 75.

ON a Trial at Bar for High Treason, the Prisoner, Mr. Crosby, took Exception to Aaron Smith's Evidence, having stood in the Pillory upon a Judgment in an Information against him for a Libel. Mr. Solicitor and Mr. Cowper insisted, That the Infamy flowed from the Crime and not from the Punishment, and that Mr. Smith's Crime was not infamous, nor did it deserve such Punishment. Holt C. J. without determining this Point held, That Aaron Smith was restored by the general Pardon of 2 W. & M. which operated by Way of Restoration, and made him a new Creature. 3 Lev. 427. Vide the Case of Chester *versus* Hawkins, That the Disability flows from the infamous Judgment, and not from the Nature of the Crime; for if a Man be convicted for a Cheat, and adjudged to stand in the Pillory, he cannot be a Witness; otherwise if he be not adjudged to stand in the Pillory: Also they held the Infamy was by the Judgment to stand in the Pillory, and not from the actually standing there, and that he was disabled to be a Witness, tho' he never stood. Nota; In these Cases the Disability is a Consequence, and the Pardon, which makes him de cetero a new Creature, discharges all Consequences, Dependancies, &c. And therefore in the Case of the King and Weeden Ford, Mich. 12 W. 3. B. R. The Question being where the King could pardon the Disability, and where not? Holt C. J. took this Difference; Where the Disability is only the Consequence of the Judgment, the King may pardon it; but where the Disability is Part of the Judgment it self, the King's Pardon will not take it away; therefore if a Man be convicted of Perjury on the Statute, the King's Pardon will not restore; for it is not a Consequence, but Part of the Judgment, viz. Quod imposterum non sit receptus ut testis. Vide Co. Ent. 368. But a Pardon by Act of Parliament will restore him in that Case. Quod nota. Quære of a Perjury at Common Law; and if the Law be

Whether the Infamy arises from the Crime or Judgment of the Pillory.

Q. Vide ante 461, 514. post. pl. 3. Faresl. 101. Hob. 59. Raym. 74.

The King may pardon Disability where it is only Consequence of the Judgment, otherwise where Part of it; but in that Case a Statute pardon will.

be the same; for there the Disability is only a Consequence, and not Part of the Judgment; otherwise if a Jury be convicted in an Attaint. Rast. 86. a.

Pitman *versus* Maddox. Hill. 11 Will. III. Coram Holt C. J. At Nisi Prius in Middlesex.

(2.)
Shop-Book
allow'd as
Evidence on
Proof of the
Servant's
Hand, who
made the
Entries, he
being dead.
Vide ante
281, 285,
355.
& Farcfl. 9.
6 Mod. 149.
1 Vent. 151.

INDEBITATUS ASSUMPSIT on a Taylor's Bill; at the Trial coram & per Holt C. J. a Shop-Book was allowed for Evidence, it being proved that the Servant that writ the Book was dead, and this was his hand, and he accustomed to make the Entries; and no Proof was required of the Delivery of the Goods; and the Chief Justice said, it was as good Evidence as the Proof of a Witness's hand to an Obligation; and he held, That tho' the Stat. 7 Jac. 1. c. 12, says, A Shop-Book shall not be Evidence after the Year, &c. That it is not of it self Evidence within the Year.

6 Mod. 248. 1 Salk. 285, 286, 287. Farcfl. 129. S. C. Holt 298.

Dominus Rex *versus* Ford. Mich. 12 Will. III. B. R.

(3.)
Prisoner ha-
ving escaped
may be a
Witness to
prove the Es-
cape volun-
tary, upon
Traverse of
an Inquisi-
tion for the
Office against
the Gaoler.
Post pl. 5.

UPON a Special Commission issued out of Chancery, an Inquisition was taken, which found, That Weedon Ford had committed five voluntary Escapes: Ford traversed, and upon the Trial, one who was suffered to escape, but was returned again, was produced to be a Witness: And it was objected That this was to save his own Bond which he had given to be true Prisoner, and would intitle him to an Action of false Imprisonment against the Marshal, and compared it to the Case of an usurious Bond. Sed per Cur', The Bond given by the Prisoner is a collateral Matter to the Escape; and the Consequence of his Evidence as to that Bond, is not material to disable him being a Witness; and it is not like the Case of Usury; for that renders the Bond void; and this is a Matter privately transacted between the Party and the Officer, of which there can be no other Evidence.

2dly, That this Witness was convicted of Barretery, and the Record produced; but the Judgment was, to be fined 50 Marks, and not to stand in the Pillory: On the other Side it was argued, That a bare Conviction of Perjury would take away one's Evidence, because it is an infamous Crime; but not so of Barretery, which was not of an infamous Nature, without an infamous Punishment, as the Pillory. Curia contra. He is disabled by the Conviction, for 'tis not the Nature of the Punishment but the Nature of the Crime and Conviction that creates the Infamy.

The Nature
of the Crime
and Convi-
ction, not of
the Punish-
ment, makes
the Infamy.
Vide ante
pl. 1.

Then 'twas insisted, That he was pardoned by the late general Pardon. Et per Holt C. J. If one be convicted of Perjury upon the Statute, he cannot be restored to his Credit by the King's Pardon; for by the Statute, 'tis Part of the Judgment, that he be infamous and lose the Credit of Testimony; but he may by a Statute-Pardon. But in other Cases, where the Infamy is only the Consequence of the Judgment, the King's Pardon may restore the Party to his Testimony. Held upon a Trial at Bar.

Perjury.
Vide ante
513, 514, 689.
6 Mod. 168.
1 Hawk. P.
C. cap. 69.

Anonymus. Pasch. 13 Will. III. B. R.

If a Witness going to Sea be by Rule of Court examin'd upon Interrogatories before a Judge, and the Trial come on before he is gone, his Deposition shall not be read, but he must appear; for the Rule was made on Supposal of his Absence.

(4.)
Deposition of
a Witness ex-
amin'd before
a Judge, be-
cause going
beyond Sea, cannot be read if he be in England. Vide ante 555, &c. ib.

Inter Oxenden Bar. and Penderice. In Canc'.

A Question was in Chancery, Whether a Legatee could be a Witness against a Will? Et per Cur', upon Debate, The Reason why a Legatee is not a Witness for the Will, is, because he is presumed to be partial in swearing for his own Interest: But the Legatee, when he swears against the Will, swears against his Interest, and so is the strongest Witness.

(5.)
Legatee may
be a Witness
against a
Will.
Vide ante
pl. 3.

Vide ante
548, 661.

Words in General.

Smith *versus* Wood. Mich. 5 W. & M. B. R.

(1.)
To call H:
Whore-ma-
ster, is suable
in the Spi-
ritual Court.

Vide 3 Lev.
17, 18, 119,
137.

2 Lev. 63.

3 Keb. 58.

1 Lev. 116.

1 Sid. 433.

1 Jo. 44.

S. C. Comb.

226.

Skin. 390.

Soof Wittal.

2 Lev. 66.

1 Mod. 23.

Impudent
brazen-fac'd
Belzebub,
not suable.
Comb. 26,
28, 29.

LIBEL in the Spiritual Court for these Words; You are a Rogue, Rascal, Whore-master, and Son of a perjured Affidavit-Bitch. Selby moved for a Prohibition, and all the Words being waived but the Word Whore-master he urged, That it was only a Word of Heat, and that Words of Passion were not defamatory, being regarded by the hearers no more than the Words of one Non Compos, or mad; Ira furor brevis est.

Holt C. J. To say Whore-master of a Man is the same with Whore of a Woman, which is an Ecclesiastical Slander. For per Selby, The Reputation of a Man is not so nice; but the Court would not distinguish them, and therefore denied the Prohibition. Holt C. J. said, To call a Man Cuckold was not an Ecclesiastical Slander, but Wittal was; for it imports his knowledge and Consent to his Wife's Adultery. Vide 1 Sid. 248. Car. 339.

Impudent brazen-faced Belzebub are not suable in the Spiritual Court, for they import Passion, but no Crime nor Discredit any more than Devil, or Prince of Darkness.

Coxeter *versus* Parsons. Hill. 10 Will. III. B. R.

(2.)
Suit lies not
in the Spi-
ritual Court
for Words,
charging an
Offence not
punishable
there.

Vide Farell.

31

S. C. Cases

B. R. 231.

DOCTOR Parsons libelled against Coxeter in the Spiritual Court for saying of him, He had no Sense, was a Dunce, and Blockhead; and he wondered the Bishop would lay his Hand upon such a Fellow, and that he deserved to have his Gown pulled over his Ears: And a Prohibition was granted; for a Parson is not punishable in the Spiritual Court for being a Knave or a Blockhead, more than another Man; and whereas it was urged, That a Parson might be deprived for Want of Learning the Chief Justice said, If that be the Case he must bring his Action at Law; for that was a temporal Damage: And a Prohibition was granted.

Acebery *versus* Barton. Pasch. 4 Ann. B. R.

A Woman libelled in the Ecclesiastical Court against another for these Words, You are a brandy-nosed Whore, You stink of Brandy: Mr. Earle moved for a Prohibition, insisting, they rather charged Intemperance than Incontinence. Vide 2 Ro. Ab. 296. Placito 15. 1 Jo. 44. 1 Cro. 110. 2 Keb. 334, 577, 581 1 Sid. 433. 1 Mod. 23. 3 Lev. 119. But the Court denied a Prohibition. (3.) Words of Incontinence.

Words actionable or not actionable.

Tassan *versus* Rogers. Mich. 1 W. & M. B. R.

CASE for Words of a Butcher, on a Colloquium of the Cow and the Flesh, that the Cow died with calving, per quod he lost such and such Customers: Verdict and Judgment pro Quer' in the Marshalsea; but on a Writ of Error it was reversed here; for the Words are not actionable; and the Special Damage does not help it; for it is not said he could not sell the rest of his Cow, but that he lost Customers. (1.) Words of a Butcher, that the Cow died of Calving, per quod he lost his Customers, not actionable. Comb. 161.

Byron *versus* Elmes. Mich. 8 W. III. B. R.

IN Case for Words, the Plaintiff declared, That she being a young Woman, the Defendant, to hinder her Marriage, said, that did you go to London for, but to drop your Slink? She went to London last Winter to lie in, and to my Knowledge several People have lain with her: And they were held not actionable; for it is not having a Bastard, but the Fornication is the crime here, and that being punishable in the Spiritual Court, Vol. II. (2.) Charge of Fornication not actionable without special Damage. S. C. Comb. 391. Cases B. R. 106.

is not punishable here without a Temporal Loss: Having a Bastard was never actionable before the Statute; nor is it since, unless the Parties come within the Penalty of the Statute, which is only when the Parish is chargeable.

Anonymus. Mich. 8 Will. III. B. R.

(3.)
She had a Bastard, not actionable because it don't appear that it was chargeable to the Parish.

1 Vent 4.
Comb. 137.

S. C. 292.

1 Sid. 396.

2 Sid. 7, 21.

1 Rol. Abr. 34, 37, 38. Palmer 298.

CASE for these Words, She had a Bastard-Child, and Verdict for the Plaintiff; and the Court thought them not actionable, according to Salter and Brown's Cases. Cro. . and denied Anne Davies's Case, 4 Co. 16. b. for she is not punishable at Common Law in the King's Temporal Courts for having a Bastard; nor is she punishable by 18 Eliz. unless her Bastard be likely to become chargeable to the Parish; the Statute only extends to such Bastards. In other Cases she is only punishable in the Spiritual Court for whoring, and may sue there, but cannot sue here too; for the Party would be doubly punished by that Means. Sed adjournatur.

S. C. 5 Mod.
398.

Savage *versus* Robbery. Pasch. 10 Will. III. B. R.

(4.)
Cheat, spoke of a Trader, not actionable without laying a Colloquium of his Trade.

1 Lev. 280.

Comber. 292.

3 Keb. 34. 2 Lev. 5, 62. Stil. 420. 3 Mod. 112.

THE Plaintiff declared that he was a Trader, and the Defendant said of him, You are a Cheat, and have been a Cheat for divers Years: Upon the first Motion, which was Mich. 9 W. III. B. R. Holt C. J. held, the Words must be understood of his Way of Living, and that it needed no Colloquium. Verdict Pasch. 10 W. 3. B. R. Mutata opinione, Judgment was arrested. Vide 1 Vent. 117, 263. 2 Saund. 307. Jones 156. Raym. 62, 169.

How *versus* Prinn. Mich. 1 Ann. B. R.

(5.)
Don't vote for him, for he is a Jacobite, and for bringing in the Prince of Wales and Popery, to destroy our Nation, spoken of a Justice of Peace and Deputy-Lieutenant; held actionable.

2 Mod. 26.

3 Lev. 30.

S. C. 2 Lutw. 1293. N. L. 410. Far. 107. Holt 652.

THE Plaintiff declared, That being a Justice of Peace and Deputy-Lieutenant, and having served as Knight of the Shire for the County of Gloucester, and intending to stand Candidate again to be Knight of the Shire for the said County, the Defendant in Discourse with J. S. speaking of the Plaintiff and his standing Candidate, said, Do not vote for him, for he is a Jacobite, and for bringing in the Prince of Wales and Popery, to destroy our Nation: Verdict for the Plaintiff, and intire Damages.

In Arrest of Judgment 'twas objected,

1st, That it was uncertain where the Prince of Wales should be brought in.

2dly, That there was no such Person, and the Court could not take Notice of him. Farell. 107.
S. C.
Lutw. 1294.
3dly, He might mean it legally by Act of Parliament.
4thly, He is not charged with any Act.
5thly, The Offices recited were not Offices of Profit. Sed per Cur;

1st, The Words being spoken with respect to an Englishman, therefore the bringing in must be supposed to be into England; the rather, because 'tis said to be, to destroy our Nation; and the Defendant could not have been found guilty, if he had appeared upon Trial to be a Dutchman, as in Cromwell's Case, Thou art a Murderer; upon Evidence, it appeared to be spoke in the Sense, a Murderer of Horses; and the Defendant was acquitted.

2dly, We will take Notice of the Prince of Wales, not as really such, but pretendedly such, being mentioned in Acts of Parliament; and one may gain a Name by Reputation, as a Bastard does that of his reputed Father.

3dly, We cannot suppose he can mean to do this fairly; but if he does, 'tis Scandal; for the King and Government being Protestant, 'tis good Reason for them to displace him, as not fit to be trusted.

4thly, As to his not being charg'd with any Act, Inclination and Principles are sufficient without an Act. 3 Lev. 90. 1 Brownlow 5. March 4. 1 Ro. 86. Ellis's Case, and so was Sir Tho. Clargis's Case.

5thly, In Offices of Profit, Words that impute either Defect of Understanding, of Ability or Integrity, are actionable; but in Offices of Credit, Words that impute Want only of Ability, are not actionable, as of a Justice of Peace: He a Justice of Peace? He is an Ass, and a beetle-headed Justice: Ratio est, because a Man cannot help his Want of Ability, as he may his Want of Honesty; otherwise where Words impute Dishonesty or Corruption; as in this Case, where the Office is an Office of Credit, and the Party charged with Inclinations and Principles which shew him unfit, and that he ought to be removed, which is a Disgrace.

In Offices of Profit Words imputing Want of Ability, are actionable; otherwise in Offices of Honour. Vide post 698. Cro.Car. 223.

Baker *versus* Peirce. Mich. 2 Ann. B. R.

S. C. 6 Mod. 23. Holt 654.

YOU stole my Box-wood, and I will prove it, were held actionable, for they tend to disgrace the Plaintiff with an Imputation of Felony, and may be so understood: These Sort of Actions stand upon their own Bottom, and are under no set Rule, but ought to be encouraged to prevent breaking the Peace: Thou art

(6.)
You stole my Box-wood, and I will prove it, actionable. Vide prox. pag. 68.

Mod. 104. 1 Jon. 11, 68, 195, &c. Poph. 211. 1 Mod. 22. 1 Lev. 280. Cro. Jac. 39, 2, 3. 312, 13. 231, 11. 442, 16.

2 Keb. 181. art a Thief and hast stoln my Wood, are actionable, There is no
 1 Lev. 205. Difference between and and for: To say a Man has the Pox, is
 1 Sid. 324. not actionable; but to say farther, and got it of a yellow-haired
 3 Lev. 166. Wench in *Moorfields*, are actionable; not that the Intendment is
 Hob. 305. necessary that he meant the French-Pox, but the Sense lean'd that
 All. 11. con. Cro Jac. 430. May.

Graves *versus* Blanchet. Pasch. 3 Ann. B. R.

(7.)
 See 4 Co. 17, &c.
 Mod. Caf. 148. S. C. 1 Vent. 4.
 1 Sid. 396. Hob. 256.
 1 Cro. 436.

ACTION for these Words, She is a Whore, and had a Bastard by her Father's Apprentice; Judgment was arrested: The Court said they could not overthrow so many Authorities: The Reason of the Law is, that Fornication is a spiritual Offence; and no Action lay at Common Law for what the Common Law took no Notice of, without special Damage.

Walmsley *versus* Russel. Trin. 3 Ann. B. R.

(8.)
 There goes your rare Chancellor to suborn Witnesses to swear against the Parson, not actionable.
 Vide 3 Lev. 166.
 1 Co. 55, 16. S. C. 6 Mod. 200.

IN Case for Words, the Plaintiff in his Declaration shewed, That he was Chancellor to the Bishop, and stood for Parliament Man, and the Defendant to defame him said, There goes your rare Chancellor to suborn Witnesses to swear against the Parson. Powys and Gould Justices held them actionable, because they touched him in his Office, and Suborning is to be taken in malam partem, and the Words were the saller if there was no Perjury or Swearing. Vide 3 Cro. 93. 1 Lev. 118, 180. 1 Cro. 14, 15, 190. Hard. 103, 501. Mo. 243. 1 Vent. 20. 1 Ro. 79.
 Holt C. J. and Powel J. contra, To say, a Man is forsworn is not actionable; a fortiori, to say one suborned another to forswear: Suborning is not a Crime of it self, but as it relates to Perjury, and there cannot be a Subornation of Perjury or Swearing, but where there is Perjury and Swearing. Here is nothing said that relates to his Office, or touches it; there goes your rare Chancellor, is only a Description of the Person.

S. C. 6 Mod. 104.
 Holt 40.

Turner *versus* Ogden. Hill. 3 Ann. B. R.

(9.)
 Words subjoining H. to Punishment may not be actionable, unless scandalous.
 See 6 Mod. 23 & ante 695.

THOU art one of those that stole my Lord *Shaftsbury's* Deer held not actionable; for tho' Imprisonment be the Punishment in those Cases, yet per Holt C. J. It is not a scandalous Punishment. A Man may be fined and imprisoned in Contempt; for there must not only be Imprisonment, but an infamous Punishment; 'tis true, calling Papist has been held actionable but that was only in respect of the Times.

1 Jon. 196. 2 Ven. 265. 1 RoH. Abr. 60. Yelv. 64.

Speed *versus* Perry Trin. 4 Ann. B. R.

CASE for these Words, You are a Raschal and a Villain, you have forgot since you lived in the *Black-bull* Yard, there you could procure broad Money for Gold, and clip it when you had so done, and then the Shears could go. Serjeant Darnell moved in Arrest of Judgment, because the Words imputed no Act, but a Power only. Sed per Cur', Where the Matter imputed is confined to a particular Place, As you could in such a Place, they must be understood to imply an Act; for a Power is the same in all Places. And Powell cited the Case of Horne and Powell, Trin. 12 W. 3. C. B. You may well spend Money at Law, for you can coin Money out of Half-pence and Farthings, which was held to import an Act done, because by a bare Power he could never be able to spend Money at Law; and the Court denied. 1 Ro. 72. Placito 9.

(10.)
In Black-bull
Yard you
could pro-
cure broad
Money for
Gold, and
clip it; held
to import an
Act, and
actionable.

Words indictable and not in- dictable.

Domina Regina *versus* Langley. Hill. 2 Ann. B. R.

INDICTMENT for saying to the Mayor of Salisbury, You Mr. Mayor, I care not a Farthing for you; and at another Day, You are a Rogue and a Rascal: On Demurrer, Mr. Ward argued, they were not spoken while he was in the Execution of his Office, and that this is no Offence indictable. Vide 1 Ro. Rep. 79. 11 Co. 95. 3 Cro. 78, 689. Mo. 247. Vent. 16. Vide cont. 1 Cro. 503, 504. 2 Bulst. 139, 140. Mod. 139. Holt C. J. These Words are not indictable, for the Mayor was not in Execution of his Office nor a Patent Officer. It might be more doubtful if the Words were of a Patent Officer; for then it is an Aspersion to the Queen and Govern-
ment

(1.)
Words of
Slander spo-
ken of a
Mayor, not
indictable;
otherwise if
written.
Comb. 46,
66.
S. C. 6 Mod.
124.
3 Salk. 190.
Holt 654.

Clause de
verborum
propalationi-
bus in the
Commission
of Oyer and
Terminer
what it re-
fers to.

ment that imploys him: Here it does not appear the Mayor was a Justice of Peace; at least not by Commission from the King; Yet if these Words had been written, an Indictment would have lain. Vide 1 Sid. 270. 1 Lev. 139. Et per totam Curiam, Words that directly tend to the Breach of the Peace, as if one Man challenge another, are indictable; and the Commission of Oyer and Terminer de propalationibus verborum, is to be construed of Words against the Government, or Scandalum Magnatum, &c. But for these Petit Offences, which are contra bonos mores, the Law has another Provision, by requiring Surety for the Peace and Good Behaviour; in Default whereof the Magistrate may commit him, when spoken out of Court; and when in Court, then the Magistrate may proceed summarily against him, and fine him for the Contempt. Quashed.

Vide Cro.
Car. 223.

Domina Regina *versus* Wrightson. Pasch. 7 Ann. B. R.

(2.)
Words of a
Justice of
Peace: He is
a Fool, an Ass,
and a Cox-
comb, and
knows no
more than a
Slickhill, nor
indictable,
but Cause to
bind to the
Good Beha-
viour.
Cro. Jac. 56,
1. 58, 4. 240,
6. 484, 3.
557, 3.
S. C. Rep.
A. Q. 166.
Holt 354.
Ante 695.

INDICTMENT for saying of Sir Rowland Gwyn, who was a Justice of Peace, in Discourse concerning a Warrant made by him, Sir Rowland Gwyn is a Fool, an Ass, and a Coxcomb for making such a Warrant, and he knows no more than a Slickhill, held naught on Demurrer: The Court held, That here was a Breach of Good Manners, and he might be bound to the Good Behaviour; but here was no indictable Offence: The Counsel urged, That tho' Words spoken of a Magistrate in the Execution of his Office, might be indictable as a Matter that disturbs the publick Peace; yet not when it refers to some particular Person. Vide 2 Keb. 494. Hutt. 131. 1 Cro. 362. 3 Mod. 139. 1 Ven. 169. And Domina Regina *versus* Soley, Mich. 4 Ann. B. R. The Defendant was indicted for these Words, He is not fit to be a Justice; for if a Man is before him, he will give it right or wrong when his Affection is; and ruled the Indictment lay not. Et per Holt C. J. To say, a Justice is a Fool or an Ass, or a Coxcomb, or a Blockhead, or a Bufflehead; is not indictable; quod fuit conce- per Powell. Vide 2 Ro. Rep. 78. 4 Inst. 181.

WRIT

W R I T.

Vide ante
Mandamus,
Replevin,
Returns.
Hob. 83.

Touchin's *Case*. Mich. 12 Will. III. B. R. Vide *Title* Amendment.

S. C. 1 Salk.
48, 49.
6 Mod. 164.
& 276 to 287.

IN all continued Writs the Alias must be tested the Day the former was returnable. Vide ante 554.

(1.)
State Trials,
659 to 706.

Dominus Rex *versus* The Mayor of Hertford. Mich.
11 Will. III. B. R.

INFORMATION in Nature of a Quo Warranto; a Venire issued returnable in Easter-Term, and a Distringas in Trinity, and an Alias Distringas fifteen Days from the Teste the same Trinity-Term: It was objected, That this was irregular, for that all Process on the Crown Side is returnable de termino in terminum, and not in fifteen Days, and the Precedents are so: It was answered, That Process of Outlawry was the only Process returnable de termino in terminum. Vide 2 Inst. 550. 1 Inst. 34. 9 Co. 119. b. [Note; These Authorities are general, and make no Distinction]. Holt C. J. said, There was no Question but the Process might be sued out returnable in fifteen Days; and Sir Samuel Astry reported the Practice according to this Diversity.

(2.)
Process out
of the Crown-
Office may be
returnable in
fifteen Days,
except of
Outlawry,
which must
be de termi-
no in termi-
num.

Dominus Rex *versus* The Mayor, &c. of Abingdon. Pasch. 12 Will. III. B. R.

S. C. Ante
431, 432.

Mandamus was directed Jacobo Courteen Majori Ballivis & omnibus principalibus Burgensibus Burgi de Abingdon, by the Constitution were to chuse the Mayor out of such persons as should be propos'd by the Commonalty, commanding them to chuse accordingly: It was objected to the Writ, That it was misdirected; for that this was but a Part of the Corporation, viz. Chief Burgesses; whereas the Name of the Corporation was, Mayor, Bailiffs and Burgesses; and it was urged, that Persons constituting a Corporation could be considered but

(3.)
Writ of Man-
damus ought
to be direct-
ed to the
Persons who
are to do the
A&.
Vide post
pl. 6.
Mod. Cases
133.

Vol. II.

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in

in one of these two Capacities, viz. their Corporate or their Natural; and that the Writ must be directed to them, either by their Names, or as a Corporation; and they cited Holt's Case 2 Jones 52. in Point. Holt C. J. said, that Case was not Law. That Serjeant Pemberton, Sir William Jones, and all the learned Part of the Bar wondered at the Resolution: And tho' it should be true, that a mandatory Writ might be directed to the whole Corporation, yet it could not be necessary it should be directed to more than those, or that Part of the Corporation that was concerned in the Execution of the Thing required; for it is not in the Power of others to put the Command of the Writ in Execution: And the Writ was held good.

S.C. Farfl 29.

Holt 761.

3 D. 121. p. 6.

Ante 273.

(4.)

Writ of Execution re-

turnable two

Terms from

the Teste, is

well; mese

Process, void.

Shirley *versus* Wright. Trin. 1 Ann. B. R.

IN Debt for an Escape of one taken upon a Ca. Sa. which appeared to be returnable the Term next but one after the Teste so that a Term intervened: After a Verdict for the Plaintiff 'twas moved in Arrest of Judgment, that the Writ was merely void, and consequently there could be no Escape, and the Sheriff did well to let him go; and 3 Cro. 468. was cited as a Case in Point. On the other Side, to shew that a Writ may be faulty, and yet not void, were cited Poph. 271. Dy. 67, 175. 21 H. 7. 16. Sty. 339. 1 Ro. 242. 3 Cro. 188. Mo. 274. 1 Cro. 271. 2 Bulst. 256. 2 Ro. Rep. 432. Per Holt C. J. Escape lies against the Sheriff; and there is a Difference between a Capias in mean Process and a Capias in Execution. In mean Process, if a Term be omitted the Writ is void in all Actions personal, and the Sheriff shall not be charged; for the Cause is discontinued and out of Court by the Intermision; and by not having a Day in Court by the Return of the Writ as he ought the Party may be at great Prejudice by Reason of the Imprisonment in the mean Time.

But in Executions a Ca. Sa. omitting a Term, is not void for the Party is not to have a Day in Court; his Cause is at an End, and he must be in Prison, whether the Writ be returned or not; nor is it necessary it should be returned. Per Curiam. The Plaintiff had Judgment, Nisi, &c.

1 Lev. 254.

1 Saund. 161,

162.

2 Lev. 109.

Writ bearing

Teste out of

Term is void,

but the Sher-

riff is justifi-

able.

And in the same Case Holt C. J. said, If a Writ of Execution bear Teste out of Term, the Sheriff is justifiable, and yet shall not be liable to an Action of Escape, for 'tis a void Writ.

Helliot *versus* Selby. Trin. 2 Ann. B. R.

IN Replevin the Declaration was, that the Defendants sum-
moniti fuerunt ad respondend. de placito Captionis & injustæ
detentionis averiarum ipsius, &c. The Defendant avowed, and
the Plaintiff pleaded in Bar, and the Defendant made a naughty
Rejoinder, upon which it was demurred; and now Weld took
Exception to the Original, that it was Nonsense, and that there
was no such Word as Averiarum. Holt C. J. If the Original
had been averiarum, it had been naught; but this is only a Re-
cital of an Original, and the Court will not judge upon a Re-
cital; but the Way to take Advantage, is, to crave Oyer; for
this Recital is only a short Intimation to the Court of what the
kind of the Plea is. Powell J. A Replevin may be by Plaint
in the Country, as well as by Original here, because it is sum-
monitus. And if this Case had been here by Error out of the
Common Pleas, in which Case the Plaintiff could not have
taken Advantage of this Fault by Oyer, then he must have al-
leged Diminution and pray'd a Certiorari; and if the Original
returned had been so, the Court would have reversed the Judg-
ment.

(5.)
Defendant
cannot take
Advantage of
an ill Original
by the
Recital, but
upon Oyer or
a Certiorari.
Vide ante
497, 658.
6 Mod. 28.
S. C. 3 Salk.
355.

Domina Regina *versus* The Mayor, &c. of Hereford.
Trin. 4 Ann. B. R.

A Mandamus to admit one to the Office of Town-Clerk was
directed to the Mayor and Aldermen of Hereford; and
Mr. Eyres urged the Writ ought to be directed to the Body Po-
litical, in whom the Inheritance of the Franchise was, by the
Name of Incorporation; and that was, Mayor, Aldermen and
Citizens; and indeed the Writ was returned by the Mayor, Al-
dermen and Citizens in this Case, and cited 3 Bulst. 190. Holt
C. J. denied that Case, and said, it is enough to direct the Writ
to those that are to execute the Writ, or do the Thing required:
Then it appeared the Mayor only was to admit; whereas the
Writ was directed to the Mayor and Aldermen; and Holt C. J.
thought the Word Aldermen was Surplusage, and the Writ well
enough; Powell J. contra, Writs ought to be directed to those,
and to those only that are to obey the Writ: How will People
know who are to obey the Writ, if the Direction is insignificant
or immaterial? If a Writ be directed to the Coroner and Sheriff,
where it ought to be to one only, it is naught; Powys and
Gould Justices agreed, and the Writ was quashed.

(6.)
Writ of Man-
damus ought
to be directed
to the Per-
sons who are
to do the Act.
Vide ante
431, 479 &
699. pl. 3.
Mod. Cases
133, 309.
S. C. 6. Mod.
309.
Rep. A. Q.
188.

Anonymus. Trin. 13 Ann. In Canc.

(7.)
 Ne exeat
 Regnum to
 stay H.'s go-
 ing to Scot-
 land since the
 Union. Of Ne exeat Regnum, see 2 Inst. 54. 4 Mod. 179. 3 Mod. 127, 169. 2 Show.
 227, &c. 1 Chan. Cases 115, 116. 2 Chan. Cas. 245. Of Homine Replegiando's & Withernams,
 vide Tit. Replevin. Vide ante 581. Farell 9.

Note; A Writ of Covenant is not amendable either by Com-
 mon Law or by Statute. 1 Salk. 53.

pleas before our Lord the King at Westminster, of the Term of Easter in the Seventh Year of the Reign of our Lord William the Third, now King of England, &c. Roll. 242.

Sir John Dalston against Janfon.

London, to wit. **B**E it remembered, That heretofore, to wit, Salk. 10.
in *Hillary* Term last past, before the Lord 5 Mod. 90.
the King, at *Westminster*, came Sir *John* Comb. 333.
Dalston, Knight and Baronet, by *John Pratt* his Attorney, and 3 Salk. 204.
brought into the Court of our said Lord the King then there Cases B. R.
his certain Bill against *Joshua Janfon*, a common Carrier, in the 73.
Custody of the Marshal, &c. of a Plea of Trespass upon the Holt 7. S. C.
Case, and there are Pledges of prosecuting, to wit, *John Roe* and
Richard Doe, which said Bill followeth in these Words, to wit, *Lon-* A Count on
don, to wit, Sir *John Dalston* Knight and Baronet complains of *Jo-* the Custom
shua Janfon, a common Carrier, in the Custody of the Marshal of of the Realm
the Marshalsea of our Lord the King, before the King himself being, against a
for that, to wit, 'That whereas the said *Joshua* on the Sixteenth common
Day of *March* in the Year of our Lord One Thousand Six Carrier.
Hundred and Ninety Three, and long before, and ever since,
has been and still is a common Carrier of Goods and Chattels,
and for his Profit used to bear and carry the Goods and Chat-
tels of all Persons whatsoever requiring such Carriage, from
Wakefield in the County of *York* to *London*, and from *London*
aforesaid to *Wakefield* aforesaid, throughout all the said Time for
the Reward to be had for the same. And whereas by the Law
and Custom of this Realm of *England*, every common Carrier
of Goods and Chattels, who receives Goods and Chattels so to be
carried, is obliged to preserve and carry the same without any
Diminution or Loss, so that by the Default of such common
Carrier or his Servant, no Damage may any ways happen there-
unto. And whereas the said Sir *John* on the said Sixteenth Day
of *March* in the Year of our Lord One Thousand Six Hundred
and Ninety Three aforesaid, at *London* aforesaid, to wit, in the
Parish of Saint *Mary le Bow* in the Ward of *Cheap*, was pos-
sessed of the following Goods and Chattels, to wit, of one Deal
box, and One Hundred Pieces of Golden Coin called Guineas, of
lawful

lawful *English* Money, as of his proper Goods and Chattels And the said Sir *John* being so possessed on the said Sixteenth Day of *March* One Thousand Six Hundred and Ninety Three afore said, at *London* afore said, to wit, in the Parish and Ward afore said, delivered the said Box with the said One Hundred Pieces of Golden Coin being in the same, to the said *Joshua*, to carry the same safely and securely for Hire from *London* afore said to *Wakefield* afore said in the County of *York* afore said, and there deliver the same to the afore said Sir *John*: And the afore said *Joshua* then and there received and had the said Box, and the said One Hundred Pieces of Gold in the same being, to carry and deliver in Manner afore said: Nevertheless the said *Joshua* hath not at any Time hitherto delivered the said Box with the said One Hundred Pieces of Gold in the same being, to the said Sir *John* but the said Box, and the said one Hundred Pieces of Gold Coin in the same being, afterwards, to wit, on the Seventeenth Day of *March* in the Year of our Lord One Thousand Six Hundred Ninety and Three afore said, at *London* afore said, in the Parish and Ward afore said, for want of the safe keeping thereof by the said *Joshua*, were destroyed and lost.

Trover laid
in the same
held not
joinable.

And whereas also on the said Sixteenth Day of *March* in the Year of our Lord One Thousand Six Hundred Ninety and Three afore said, at *London* afore said, to wit, in the Parish and Ward afore said, the said Sir *John* was possessed of the other Goods following, to wit, of one Deal Box and one Hundred Pieces of Golden Coin, called *Guineas* of lawful *English* Money, as of his proper Goods and Chattels, and being so possessed the said Sir *John* afterwards, to wit, the same Sixteenth Day of *March* in the Year of our Lord One Thousand Six Hundred Ninety and Three afore said, at *London* afore said, in the Parish and Ward afore said, casually lost those Goods and Chattels out of his Hands and Possession, which said Goods and Chattels afterwards, to wit, the same Sixteenth Day of *March* in the Year of our Lord One Thousand Six Hundred Ninety and Three afore said, at *London* afore said, in the Parish and Ward afore said, by finding came to the Hands and Possession of the said *Joshua*: Yet the said *Joshua* knowing the Goods and Chattels last before mentioned to be the proper Goods and Chattels of the said Sir *John*, and to him the said Sir *John* of Right to belong and appertain, yet fraudulent contriving and intending craftily and subtilly to deceive and defraud the said Sir *John*, hath not yet delivered the Goods and Chattels last before mentioned to the said Sir *John*, although often requested, &c. but afterwards, to wit, the Seventeenth Day of *March* in the Year of our Lord One Thousand Six Hundred Ninety and Three afore said, at *London* afore said, in the Parish and Ward afore said, converted and disposed of the Goods and Chattels last mentioned to the proper Use and Advantage of him the said *Joshua*, to the Damage of the said Sir *John*.

John of One Hundred and Fifty Pounds: And therefore he brings this Suit, &c.

And now at this Day, to wit, *Wednesday* next after fifteen ^{Plea.} Days, from the Day of *Easter* in this same Term, until which Day the said *Josbua* had Leave to imparle to the said Bill, and then to answer, &c. before the Lord the King at *Westminster*, comes as well the said Sir *John Dalston* Knight and Baronet by his Attorney aforesaid, as the said *Josbua* by *William Midgeley* his Attorney, and the said *Josbua* defends the Force and Injury when, &c. and saith that he is not thereof guilty. And of this he puts himself upon the Country, and the said Sir *John Dalston* does so likewise, &c. Therefore let a Jury come thereupon before the Lord the King at *Westminster*, on *Tuesday* next after one Month from the Day of *Easter*, and who neither, &c. to recognize, &c. because as well, &c. The same Day is given to the said Parties there, &c.

Pleas before our Lady the Queen at Westminster, of the Term of St. Michael in the Second Year of the Reign of our Lady Anne, now Queen of England, &c. Roll 398.

The Earl of Banbury against Woods and his Wife.

London, to wit, **T** *Thomas Woods*, Merchant, and *Mary* his ^{Salk. 5.} Wife were attached to answer *Charles* ^{6 Mod. 84.} *Earl of Banbury* and *Mary Countess of Banbury* his Wife, in a ^{3 Salk. 20.} *Plea*, why they took the said Countess, and her so taken detain, &c. ^{Holt 41. S.C.} And whereupon the said Earl and Countess by *Richard Langford* their Attorney complain, That the said *Thomas Woods* and *Mary* his Wife, on the Twentieth Day of *April* in the second Year of the Reign of our Lady *Anne*, now Queen of England, &c. at *London* aforesaid, to wit, in the Parish of *St. Helen* in the Ward of *Bishopsgate*, the said Countess took, and her so taken to yet hold and detain: Wherefore they say they are injured, and have Damages to the Value of Ten Thousand Pounds: And they bring this Suit, &c. And the said *Thomas Woods* and *Mary* his Wife, by *Richard* their Attorney, come and crave *Oyer* of the original Writ aforesaid, and of the Return of the same Writ; and they are read

read to them in these Words, to wit, *Anne* by the Grace of God of *England, Scotland, France* and *Ireland*, Queen, Defender of the Faith, &c. To the Sheriffs of *London*, Greeting. Whereas we have oftentimes commanded you, that you should justly and without Delay replevy *Mary* the Wife of *Charles* Earl of *Banbury*, whom *Thomas Woods* Merchant, and *Mary* his Wife took and her so taken do detain, as it is said, unless she was taken by the special Command of us, or of our Chief Justice, or for the Death of any Person, or for our Forest, or for any other Guilt wherefore according to the Custom of *England* she is not repleviable, lest we should further hear Claim thereof for Defect of Justice; or that you would signify to Us the Cause why you would not or could not execute our Mandate formerly to you thereupon directed: And you despising our said Precepts, as we have been informed, have not hitherto taken Care to replevy the said *Mary* the Wife of the said Earl, or to signify unto Us the Cause why you would not or could not do it; in manifest Contempt of Us and our Mandates, and to the great Damage and Grievance of them the said Earl and Countess, whereat we very much wonder and are moved. Still we command and firmly injoin you, that you replevy the said *Mary* the Wife of the said Earl, according to the Tenor of our said Mandates to you before directed for that Purpose, or that you yourselves be before Us from the Day of *St. Michael* in one Month, wheresoever we shall then be in *England*, to shew why our said Mandates so often to you directed, you have contemptuously refused to execute. And have you there this Writ, Witness Ourself at *Westminster*, the Twenty-second Day of *June* in the second Year of our Reign (*Cesar*). By Virtue of this Writ to us directed, we do certify that no other Writ or Mandate of our said Lady the Queen of Replevying the within named *Mary* the Wife of *Charles* Earl of *Banbury*, whom the within named *Thomas Woods* and *Mary* his Wife have taken, and her so taken do detain, as within specified, than the Writ of *Pluries Replevin* of the said *Mary* the Wife of *Charles* Earl of *Banbury*, came to our Hands, or was delivered to us. And further we do certify to the said Lady the Queen, That the said *Mary* the Wife of *Charles* Earl of *Banbury* is removed afar off to Places to us unknown, by the said *Thomas Woods* and *Mary* his Wife, wherefore we cannot replevy the said *Mary* the Wife of the said *Charles* Earl of *Banbury*, as we are within commanded. The Answer of *Sir Gilbert Heathcote*, and *Joseph Wolfe*, Esquire, Sheriffs.

Which being read and heard, the said *Thomas Woods* and *Mary* his Wife demand Judgment of the said Writ, because they say that by the Form of the Statute the Addition of the Village or Hamlet, or Place, and County, of the Residence of the said *Thomas* ought to be contained in the said original Writ of the said *Charles* Earl of *Banbury*, and *Mary* Countess of *Banbury* his

his Wife : And this they are ready to verify. Wherefore because such Addition is not contained in the said Writ, the said *Thomas* and *Mary* pray Judgment of the said Writ, and that the said Writ be quashed, &c.

And the said *Charles* Earl of *Banbury*, and the said *Mary* Countess of *Banbury* his Wife, say, that notwithstanding any Matter by the said *Thomas* and *Mary* his Wife above pleaded in Abatement of the Writ, the Writ of the said Earl and Countess ought not to be quashed, because they say that the Plea aforesaid, by the said *Thomas* and *Mary* his Wife pleaded in Manner and Form aforesaid, and the Matter in the same contained, are not sufficient in Law to quash the said Writ of them the said Earl and Countess. To which said Plea they the same Earl and Countess need not, neither are they in any manner, bound by the Law of the Land to answer ; and this they are ready to verify ; wherefore for want of a sufficient Plea in this Behalf of them the said *Thomas* and *Mary* his Wife, they the said Earl and Countess demand Judgment, and that the Writ of them the said Earl and Countess may be adjudged good, and that the said *Thomas* and *Mary* may further answer to the said Writ, &c.

And the said *Thomas* Woods and *Mary* his Wife say, that the said Plea by them the said *Thomas* and *Mary* in Manner and Form aforesaid pleaded, and the Matter therein contained, are good and sufficient in the Law to quash the said Writ of them the said Earl and Countess, which said Plea and the Matter therein contained, they the said *Thomas* and *Mary* are ready to verify, as the Court, &c. And because the said Earl and Countess have not answered to the said Plea, nor have hitherto any ways gained it, they the said *Thomas* and *Mary* as before pray Judgment of the aforesaid Writ, and that the same Writ be quashed, &c.

But because the Court of the said Lady the Queen now here, is not yet advised of giving their Judgment of and concerning the Premises, Day is therefore given to the said Parties before the Lady the Queen, until wheresoever, &c. of hearing their Judgment of and concerning the said Premises, Because the Court of the said Lady the Queen now here, is not yet thereof, &c.

Pleas before our Lady the Queen at Westminster, of the Term of St. Michael, in the First Year of the Reign of our Lady Anne, now Queen of England, &c. Roll 344.

Haywood against Davies and Others.

Far. 104.
Salk. 4.
S. C.

Trespass for
breaking and
entering of
the Plain-
tiff's Close
and Yard,
and disturb-
ing the Pos-
session.

Middlesex, to wit. **B**E it remembred, That on *Friday* next after three Weeks from the Day of *St. Michael* in this same Term, before the Lady the Queen at *Westminster*, come *Rebecca Haywood* by *William Smyth* her Attorney, and brings into the Court of the said Lady the Queen now here her certain Bill against *Margaret Davis*, otherwise *Davison*, and *Mary Bonner* in Custody of the Marshal, &c. of a Plea of Trespass, and there are Pledges of prosecuting, namely *John Doe* and *Richard Roe* which said Bill followeth in these Words, that is to say, *Middlesex, to wit, Rebecca Haywood* complains of *Margaret Davis* otherwise *Davison*, and *Mary Bonner* in the Custody of the Marshal of the Marshalsea of our Lady the Queen, before the Queen herself being, for that they the same *Margaret* and *Mary*, on the first Day of *October* in the first Year of the Reign of our Lady *Anne*, now Queen of *England, &c.* with Force and Arms, &c. the Close and Court-yard of the said *Rebecca* in the Parish of *Stebunheath*, otherwise *Stepney*, in the County of *Middlesex* aforesaid broke and enter'd, and her the said *Rebecca* in the quiet Use and Occupation of the said Close and Court-yard did then and there disturb and hinder; And also for that they the same *Margaret* and *Mary* afterwards, to wit, the Day and Year aforesaid with Force and Arms, &c. another Close and Court-yard of the same *Rebecca* in the Parish and County aforesaid did break and enter, and Five Hundred Pails of Water and other Water of the same *Rebecca* to the Value of Twenty Shillings, from and out of a certain Fountain of her the same *Rebecca*, in the Parish and County aforesaid being, without the Licence of her the said *Rebecca* and against her Will, from and out of the Fountain aforesaid then and there did take and carry away; And also for that they the same *Margaret* and *Mary* afterwards, to wit, the same Day and Year last aforesaid, with Force and Arms, &c. a great

Quantity of Dirt, Soil, and Water, in and upon the Land and another Court-yard of the same *Rebecca* in the Parish and County aforesaid, did then and there put, place, pour out, and cast forth, and other Enormities to the same *Rebecca* did then and there commit, against the Peace of our said Lady the Queen that now is, and to the Damage of her the said *Rebecca* Thirty and Nine Shillings: And therefore she brings this Suit, &c.

And the said *Margaret* and *Mary* in their proper Persons come and defend the Force and Injury, &c. and pray Judgment of the said Bill of her the said *Rebecca*, and that the same Bill may be quashed, because they say that the Close and Court-yard, and also the Places in which the said Trespasses are supposed to be done, are, and at the same Time in which, &c. were one Acre of Land, and that the said *Rebecca* at the same Time in which, &c. had nothing in the same Acre of Land, unless together and undividedly with the said *Mary Bonner*, who is in full Life at the Parish of *Stepney* in the County of *Middlesex*: And this they are ready to verify. Wherefore they pray Judgment of the said Bill, and that the same Bill may be quashed, &c.

Plea of Tenancy in Common in Abatement.

And the said *Rebecca* saith, that the aforesaid Bill of her the said *Rebecca* for the Reason before alledged ought not to be quashed, because she saith that she, at the several Times the several Trespasses aforesaid are supposed to be committed, was sole seised of the said Close and Court-yard in the Declaration of her the said *Rebecca* first mentioned, and also of the said Close and Court-yard in the Declaration aforesaid of her the said *Rebecca* secondly mentioned, and of the aforesaid Fountain in that Declaration in like Manner mentioned, and also of the third Court-yard in the said Declaration of the said *Rebecca* thirdly mentioned, and that the aforesaid *Margaret* and *Mary* at the said several Times when, &c. did commit the several Trespasses aforesaid, as the said *Rebecca* by her said Declaration above complains against them; without that, that the said *Mary Bonner* at the respective Times aforesaid, or any of them, had any Thing in the said Premises, or any of them: And she prayeth that this may be inquired by the Country.

Replication.

Traverse of the Tenancy in Common.

And the said *Margaret Davis*, otherwise *Davison*, and *Mary Bonner* say, that the Plea aforesaid by her the said *Rebecca* Haywood in Manner and Form above by their said Replication pleaded, and the Matter in the same contained, are not sufficient in Law to compel them the said *Margaret* and *Mary* to answer the Bill of her the said *Rebecca*, to which said Plea they the said *Margaret* and *Mary* need not, neither by the Law of the Land are they bound in any Manner to answer: And this they are ready to verify. Wherefore for Want of a sufficient Replication of the said *Rebecca* in this Behalf, they the said *Margaret* and *Mary* as before pray Judgment of the said Bill of her the said *Rebecca*, and that the same Bill may be quashed. And for Causes

Demurrer.

Causes of Demurrer in Law in this Behalf, according to the Force of the Statute in such Case lately made and provided, the said *Margaret* and *Mary* here shew to the Court these Causes following; For that the said Plea of her the said *Rebecca* is double, uncertain, and wants Form, and concludes to the Country.

Joinder in
Demurrer.

And the said *Rebecca Haywood* saith, that the Plea aforesaid by her the said *Rebecca* in Manner and Form aforesaid in her Replication above pleaded, and the Matter in the same contained are good and sufficient in Law to compel them the said *Margaret Davis* and *Mary Bonner* to answer the Bill aforesaid of her the said *Rebecca*; which said Plea, and the Matter in the same contained, the same *Rebecca* is prepared to verify and prove as the Court, &c. And because the said *Margaret* and *Mary* have not answered that Plea, nor have hitherto in any wise contradicted it, the same *Rebecca* prays Judgment; and that the said *Margaret* and *Mary* may further answer the said Bill of her the said *Rebecca*, &c. But because the Court of our said Lady the Queen now here, are not yet advised of giving their Judgment of and concerning the Premises, a Day therefore is given to the said Parties before our Lady the Queen at *Westminster*, until *Tuesday* next after Eight Days from the Day of *St. Martin*, for Hearing their Judgment of and concerning the Premises, For that the Court of our said Lady the Queen now here is not yet thereto &c.

A *Respondeas ouster* awarded

Pleas before our Lady the Queen at Westminster, in the Term of Saint Michael in the Fifth Year of the Reign of our Lady Anne, now Queen of Great Britain &c. Roll 439.

Stroud against Lady Gerrard.

Salk. 8. S. C.

Middlesex, to wit. **B**E it remembred, That on *Wednesday* next after three Weeks from the Day of *Saint Michael* in this same Term, before our Lady the Queen at *Westminster*, cometh *Thomas Stroud* by *Daniel Brown* his Attorney and produceth in the Court of our Lady the Queen that now here his certain Bill against the Lady [or Dame] *Elizabeth* Ger-

ard, otherwise Garret, in the Custody of the Marshal, &c. of a
Plea of Trespas upon the Case, and there are Pledges of pro-
secuting, to wit, *John Doe* and *Richard Roe*, which said Bill fol-
loweth in these Words, to wit, *Middlesex*, to wit, *Thomas Stroud*
complains of the Lady *Elizabeth Gerard*, otherwise *Garret*, in the
Custody of the Marshal of the *Marshalsea* of our Lady the Queen
before the Queen herself being; for that, to wit, that whereas the
said *Elizabeth* on the Tenth Day of *October* in the Fifth Year of
the Reign of our Lady *Anne* now Queen of *England*, &c. at
the Parish of *St. Clement Danes* in the County of *Middlesex*
aforesaid, was indebted to the said *Thomas* in fifteen Pounds of
lawful *English* Money, as well for diverse Mason's Works by him
the said *Thomas* for the aforesaid *Elizabeth* at the special In-
stance and Request of the said *Elizabeth* before then made and
performed, as for Stone and other Materials and Necessaries in and
about the doing and performing the said Works used and employ-
ed by him the said *Thomas*, at the like Instance and Request of
the said *Elizabeth* found and provided; and being so thereupon
indebted, she the same *Elizabeth* in Consideration thereof under-
took, and did then and there faithfully promise the said *Thomas*
that she the said *Elizabeth*, when thereafter required so to do,
would well and faithfully pay and satisfy the said fifteen Pounds
to the said *Thomas*: And whereas also the said *Thomas*, after-
wards, to wit, the same Day and Year abovementioned, at the
Parish aforesaid in the County aforesaid, at the like Instance and
Request of the same *Elizabeth*, had done and performed for the
aforesaid *Elizabeth* diverse other Masons Works, and had found
and provided and used Stones and other Materials and Things
necessary in and about the doing and performing of the said
Works last mentioned; the said *Elizabeth* in Consideration
whereof, afterwards, to wit, the same Day and Year aforesaid, at
the Parish aforesaid in the County aforesaid, undertook, and then
did there faithfully promised the said *Thomas*, that she the same
Elizabeth would well and truly pay and satisfy to the said *Tho-*
mas, when she should afterwards be requested the same, as well
much Money as the same *Thomas* should reasonably deserve
have for the said other Mason's Works last mentioned, at the
Time of the doing and performing the same, as also so much
Money as the aforesaid Stones and other Materials and Things
necessary last mentioned, at the Time of the finding and provi-
ding of the same were reasonably worth: And the said *Thomas*
Fact saith, that he the said *Thomas*, for the said Mason's
Works last mentioned, at the Time of doing and performing the
same, reasonably deserved to have other fifteen Pounds of like
lawful *English* Money; and that the said Stones and other Ma-
terials and Things necessary last mentioned at the Time of the
finding and providing of them were reasonably worth other fifteen
Pounds of like lawful *English* Money, to wit, at the Parish
aforesaid

Indebitatus
Assumpsit
for Mason's
Work and
Materials
found.

Quantum
meruit for
the same.

Indebitatus
assumpsit as
well for Ma-
son's Work
as Materials.

Indebitatus
assumpsit for
Work.

Breach.

Misnomer
pleaded in
Abatement.

aforesaid in the County aforesaid, of which the said *Elizabeth* then and there had Notice: And whereas also the said *Elizabeth* afterwards, to wit, the same Day and Year abovesaid, at the Parish aforesaid in the said County was indebted to the said *Thomas* in other fifteen Pounds of like lawful *English* Money, as well for other Mason's Work for the said *Elizabeth*, by the same *Thomas*, at the like special Instance and Request of the same *Elizabeth*, before that Time wrought and done, as for diverse Materials and Things necessary, used in and about the same Work by the aforesaid *Thomas*, at the like Instance and Request of the said *Elizabeth*, before then bought, found, and provided, as for diverse Sums of Money, for the said *Elizabeth* by the same *Thomas*, at the like Instance and Request of her the said *Elizabeth*, before that Time laid out and disbursed; and being so indebted the said *Elizabeth* afterwards, to wit, the Day and Year aforesaid, at the Parish aforesaid in the County aforesaid, in Consideration thereof undertook, and then and there did faithfully promise the said *Thomas*, that she the same *Elizabeth* would well and faithfully pay and satisfy the said last mentioned fifteen Pounds to the aforesaid *Thomas*, when she should be thereunto afterwards requested: And whereas also the said *Elizabeth*, afterwards, to wit, the same Day and Year abovementioned, at the Parish aforesaid in the County aforesaid in Consideration that the said *Thomas*, at the like special Instance and Request of the said *Elizabeth*, had wrought and done for the same *Elizabeth* other Work belonging to a Mason [or Mason's Work] took upon herself, and then and there did faithfully promise the said *Thomas*, that she the same *Elizabeth* would well and truly pay and satisfy twenty Pounds of the like lawful Money of *England*, for the said last mentioned Work by the same *Thomas* for the said *Elizabeth* so wrought and done as aforesaid, to the same *Thomas*, when thereunto after requested: Yet the said *Elizabeth* her several Promises and Assumptions aforesaid in no wise regarding, but contriving and fraudulently intending the same *Thomas* in this Behalf craftily and subtilly to deceive and defraud, the aforesaid several Sums of Money, any Part thereof, hath not yet paid to the said *Thomas* (although the said *Elizabeth* by the said *Thomas* afterwards, to wit, the Twelfth Day of *October* in the Fifth Year aforesaid, at the Parish aforesaid in the County aforesaid, and oftentimes afterwards, was required so to do) But hath hitherto altogether refused, and still doth refuse to pay him the same. Wherefore the said *Thomas* saith that he is injured, and hath Damage to the Value of Sixty Pounds: And therefore he brings this Suit, and the Lady *Honor Gerard*, against whom the aforesaid *Thomas* exhibited his Bill by the Name of the Lady *Elizabeth Gerard* otherwise *Garret*, in her proper Person comes and defends the Force and Injury, &c. And prays Judgment of the said Bill,

use she saith that she was baptized by the Name of *Honor*,
to wit, at the Parish of *St. Clement Danes* aforesaid, and by
the same Name hath been always from her Baptism to this Time
known and called; without that, that she the said *Honor* now
or ever was known or called by the Name of *Elizabeth*, as ^{Traverse.}
the Bill aforesaid is above supposed: And this she is prepa-
red to verify: Wherefore she prays Judgment of the aforesaid
Bill, and that the said Bill may be quashed.

And the said *Thomas Stroud* prays a Day to imparle to the Plea
aforesaid; And it is granted to him, &c. And hereupon a Day ^{Repl.}

is given to the said Parties before our Lady the Queen at *West-*
minster, until *Thursday* next after eight Days from the Day of ^{Imparlanccs}
Hillary, that is to say, for the aforesaid *Thomas* to im- ^{for the}
parle to the aforesaid Plea, and then to reply, &c. At which ^{Plaintiff.}

Day before our Lady the Queen at *Westminster* came as well
the said *Thomas Stroud* by his Attorney aforesaid, as the said
Defendant in her proper Person; and the said *Thomas* prays a
further Day to imparle to the aforesaid Plea; and it is granted
to him, &c. and upon this a further Day is given to the said
Parties before our Lady the Queen at *Westminster*, until *Wednes-*
day next after fifteen Days from the Day of *Easter*, that is to
say, for the said *Thomas* to imparle to the aforesaid Plea, and
then to reply, &c. At which Day before the Lady the Queen

at *Westminster* cometh as well the said *Thomas Stroud* by his ^{Replication}
Attorney aforesaid, as the aforesaid Defendant in her proper Per- ^{by way of}
son: And the said *Thomas* saith, that the said Lady *Gerard*, ^{Estoppel,}
otherwise *Garret*, the Person against whom the said *Thomas* ex- ^{that the De-}
hibited the said Bill by the Name of Lady *Elizabeth Gerard*, ^{endant pur}
otherwise *Garret*, to his aforesaid Plea ought not to be admit- ^{in Bail by}
ted to quash the said Bill of the said *Thomas*, because he saith ^{the Name of}
that she the said Lady *Gerard*, otherwise *Garret*, the Person ^{Eliz.}

against whom the same *Thomas* in the Term of *St. Michael*
last past exhibited his said Bill by the Name of the Lady *Eliza-*
beth Gerard, otherwise *Garret*, in this said Term of *St. Michael*,
in common Bail in Court here, at the Suit of the said *Tho-*
mas, in the Plea aforesaid, by the Name of Lady *Elizabeth Gar-*
ret, as by the Record thereof remaining in the same Court of
the said Lady the Queen before the Queen herself at *Westmin-*
ster more fully appeareth: And this he is prepared to verify by the
said Record: Wherefore he prayeth Judgment if the said Lady
Gerard, otherwise *Garret*, the Person against whom the same
Thomas exhibited his said Bill by the Name of Lady *Elizabeth*
Gerard, otherwise *Garret*, ought to be admitted to her said Plea
the quashing of his said Bill against the said Record, &c.

And the aforesaid *Honor Gerard*, against whom the aforesaid ^{Demurrer.}
Thomas exhibited his Bill aforesaid by the Name of Lady *E-*
lizabeth Gerard, otherwise *Garret*, saith, that the aforesaid Plea
of the said *Thomas* in Manner and Form aforesaid above in his
Replication

Joinder.

Replication pleaded, and the Matter in the same contained, are not sufficient in Law to compel her the said *Honor* to answer the said Bill of him the said *Thomas*: To which said Plea she the same *Honor* need not, nor is by the Law of the Land obliged in any Manner to answer: And this she is ready to verify: Wherefore for Default of a sufficient Replication in this Behalf, she the said *Honor*, as before, prays Judgment of the said Bill, and that the same Bill may be quashed, &c. And the said *Thomas* saith, that the said Plea by the said *Thomas* in Manner and Form aforesaid above in his Replication pleaded, and the Matter therein contained, are good and sufficient in Law to compel the said *Elizabeth* to answer to the aforesaid Bill of the said *Thomas* thereupon against the said *Elizabeth*: Which said Plea, and the Matter in the same contained, the said *Thomas* is prepared to verify and prove, as the Court, &c. And because the said *Elizabeth* hath not answered, nor hath hitherto in any wise contradicted it, he the same *Thomas*, as before, prayeth Judgment, and that the said *Elizabeth* be compelled to answer to the aforesaid Bill of the said *Thomas*, &c. But because the Court of our said Lady the Queen now here are not advised of giving their Judgment of and concerning the Premises, Day therefore is given to the aforesaid Parties before our Lady the Queen at *Westminster*, until Day next after of Hearing their Judgment of and concerning the said Premises; For that the Court of our said Lady the Queen now here is not yet thereof, &c.

Pleas before our Lord the King at Westminster of the Term of the Holy Trinity in the Tenth Year of the Reign of our Lord William the Third, now King of England, &c. Roll 763.

Johnson against Long.

Salk. 10.
Carth. 455.
S. C.

Somerset, to wit, **B**E it remembred, That heretofore, to wit in the Term of *St. Michael* last past before the Lord the King at *Westminster*, came *Timothy Johnson* by *Philip Hodges* his Attorney, and brought into the Court of our said Lord the King then there his certain Bill against *John Long*, in the Custody of the Marshal, &c. of a Plea of Trespass upon the Case, and there are Pledges of prosecuting to wit, *John Doe* and *Richard Roe*, which said Bill followeth in these

these Words, to wit, *Somerset*, to wit, *Timothy Johnson* complains of *John Long*, in the Custody of the Marshal of the Marshalsea of the Lord the King that now is, before the King himself being, for that, to wit, That whereas the said *Timothy*, on the Twenty First Day of *April* in the Eighth Year of the Reign of our Lord *William* the Third now King of *England*, &c. and ever after to this Time, was possessed and still is possessed of a certain antient Work-house, situate and being in the Parish of *Whatley* in the County aforesaid, in which Work-house on the same Twenty First Day of *April* in the Eighth Year aforesaid, and from Time whereof the Memory of Man is not to the contrary, there was a certain antient Window in the West Part of the same Work-house, through which a very wholesome Air, and a chearing Light entered and came in, and used and was accustomed to enter and come in on the same Twenty First Day of *April* in the Eighth Year aforesaid, and for all the Time aforesaid, to the great Benefit and Advantage of the Occupiers of the said Work-house: And whereas the said *John* on the first Day of *April* in the Eighth Year aforesaid, and always afterwards to this Time, had been possessed, and doth still remain possessed of a certain Parcel of Land, with the Appurtenances, situate, lying, and being in the Parish of *Whatley* aforesaid in the County aforesaid, lying contiguous to the aforesaid Work-house, and being so possessed thereof, the said *John* contriving and fraudulently intending many Ways to burthen and oppress the said *Timothy*, and altogether to deprive him the said *Timothy* of the Air and Light which into the Work-house aforesaid through the Window aforesaid used and was accustomed to enter and come in, and to stop up the aforesaid Work-house with horrid Darkness, and altogether to deprive the said *Timothy* of the Use and Advantage of the said Work-house, on the First Day of *April* in the Eighth Year aforesaid, at *Whatley* aforesaid in the County aforesaid, erected and built anew a certain Wall upon the said Parcel of Land of the said *John*, so near the said Work-house, that by the same Erection of the Wall aforesaid, the said Window on the said Twenty First Day of *April*, and always after, to the Day of exhibiting this Bill, to wit, the Twenty Third Day of *October* in the Ninth Year of the Reign of our said Lord the now King, was very much stopped up and darkened, whereby the same *Timothy* totally lost and was deprived of the whole Advantage and Easement of the said Window, and the Comfort and Wholesomeness of the Air and Light which used to enter and come in and upon the said Window as aforesaid, and the whole Use and Profit of the said Work-house from the said Twenty First Day of *April* in the Eighth Year aforesaid to the aforesaid Twenty Third Day of *October* in the Ninth Year aforesaid: Wherefore the said *Thomas* saith, that he is prejudiced and damnified to the Value of Forty Pounds: And thereupon he brings this Suit, &c.

Declaration for a Nuisance.

Possession alledged in an old Work-house, wherein was a Window Time out of Mind.

Defendant's Possession in a Piece of Land adjoining thereto.

Defendant obstructed the Light, whereby the Plaintiff lost the Benefit of his Shop.

Imparlance.

Pleads another Action and Recovery for the same Nuisance in Bar.

Setting forth a former Declaration.

And now at this Day, to wit, *Friday* next after the Morrow of the *Holy Trinity* in this same Term, until which Day the said *John Long* had Leave to imparle to the said Bill, and then to answer, &c. before our Lord the King at *Westminster* comes as well the said *Timothy* by his Attorney aforesaid, as the said *John* by *Jacob Long* his Attorney, and the said *John* defends the Force and Injury, when, &c. And saith that the said *Timothy* ought not to have or maintain his said Action thereupon against him, because he saith that the aforesaid *Timothy* heretofore, to wit, in *Easter* Term in the Eighth Year of the Reign of our said Lord the King that now is, in the Court of the said Lord the King, before the King himself here, to wit, at *Westminster* in the County of *Middlesex*, impleaded the same *John Long* in a certain Plea of *Trespass* upon the Case, declaring against him, That whereas the same *Timothy* on the Tenth Day of *October* in the seventh Year of the Reign of our Lord the King that now is, and always afterwards until that Time, had been, and then was possessed of a certain antient Work-house, situate and being in the Parish of *Whatley* in the County aforesaid and that in that Work-house on the same Tenth Day of *October* in the seventh Year aforesaid, and from Time whereof the Memory of Man was not then to the contrary, there was a certain antient Window in the West Part of the said Work-house, and that through the same Window the most wholesome Air and Light entered and came in on the same Tenth Day of *October* in the seventh Year aforesaid, and for the whole Time aforesaid entered and came in, and was used and accustomed to enter and come in, to the great Benefit and Advantage of the Occupiers of the said Work-house; and that the said *John* on the said Tenth Day of *October* in the seventh Year aforesaid, and always afterwards until that Time, had been possessed and then was possessed of a certain Parcel of Land with the Appurtenances, situate, lying and being in the Parish of *Whatley* in the County aforesaid lying contiguously to the aforesaid Work-house; and being so possessed thereof, the said *John* contriving and fraudulently intending many Ways to burthen and oppress the said *Timothy*, and altogether deprive him the said *Timothy* of the Air and Light which used and was accustomed to come and enter into the said Work-house through the Window aforesaid, and to stop up the Work-house aforesaid with terrible Darknes, and wholly to deprive the said *Timothy* of the Use and Advantage of the said Work-house on the said Tenth Day of *October* in the seventh Year aforesaid at *Whatley* aforesaid in the County aforesaid, did newly erect and build a certain Wall upon the said Parcel of Land of him the said *John*, so near the said Work-house, that by the same erection of the Wall aforesaid, the aforesaid Window, on the said Tenth Day of *October*, and always afterwards until the Twentieth Day of *April* in the Eighth Year of the Reign of the now King

was very much stopped up and darkened, whereby the said *Timothy* totally lost and was deprived of the whole Advantage and Easement of the said Window, and the Comfort and Wholesomeness of the Air and Light, which in and through the said Window aforesaid was accustomed to enter and come in, and the whole Use and Profit of the said Work-house from the said Tenth Day of *October* in the Seventh Year aforesaid, unto the said Twentieth Day of *April* in the Eighth Year aforesaid: Wherefore the said *Timothy* then said that he was injured, and had received Damage to the Value of Forty Pounds. And thereupon he then brought his Suit, &c. And there were such Proceedings thereupon in the same Court here, to wit, at *Westminster* aforesaid, after that the said *John* had there pleaded thereunto, that he was not thereof guilty, and by a certain Jury of the Country had been thereof found guilty, That afterwards, to wit, in the Term of *St. Michael* then next following, by the same Court here, it was considered, that the said *Timothy* should recover against the said *John* Fourteen Pounds for his Damages which he had sustained as well by Occasion of the Premises in the same Record mentioned, as for his Costs and Damages by him about his Suit in that Behalf laid out, as by the Record thereof remaining in the same Court here, to wit, at *Westminster* aforesaid, more fully appears: And the same *John* further saith, that the aforesaid Work-house, Window, Erection, and Building of the Wall aforesaid, in the said recited Record mentioned, and the aforesaid Work-house, Window, Erection, and Building of the Wall aforesaid, in the Bill of the said *Timothy* against him the said *John Long* now exhibited and above-mentioned and expressed, are the same Work-house, Window, Erection and Building, of the Wall, and not other nor different; and that the aforesaid *Timothy* in the above recited Record named Plaintiff, and the aforesaid *Timothy* above in the said Bill named Plaintiff, are one and the same Person, and not another nor different; and that the aforesaid *John* in the said recited Record named Defendant, and the aforesaid *John* in the said Bill above named Defendant, are one and the same Person, and not another nor different: And this he is ready to verify: Whereupon he prays Judgment if the aforesaid *Timothy* ought to have or maintain his said Action against him, &c.

Judgment in the former Proceedings.

Averment of the Identity.

Demurrer.

And the said *Timothy* saith, that he, notwithstanding any Matter by the said *John* above in pleading alledged, ought not to be precluded from having his said Action thereupon against him the said *John*; because he saith, that the Plea aforesaid by the said *John* in Manner and Form aforesaid above pleaded, and the Matter therein contained, are not sufficient in the Law to preclude the same *Timothy* from having his said Action thereupon against the said *John*; to which said Plea he the same *Timothy* hath no Necessity, neither by the Law of the Land is bound in any

any Manner to answer: And this he is ready to verify: Whereupon for Default of a sufficient Answer in this Behalf, the same *Timothy* prays Judgment, and his Damages by Occasion of the Premises aforesaid to be to him adjudged, &c.

Joinder.

And the aforesaid *John* saith, that the said Plea by him the said *John*, in Manner and Form aforesaid above pleaded, and the Matter in the same contained, are good and sufficient in the Law to preclude the said *Timothy* from having his said Action thereupon against him the said *John*, which said Plea, and the Matter in the same contained, he the same *John* is ready to verify and prove as the Court, &c. And because the said *Timothy* hath not answered to the said Plea, nor hitherto any Ways contradicted it, he the said *John*, as before, prays Judgment, and that the said *Timothy* be debarred of having his said Action against him the said

Continuance.

John. But because the Court of the said Lord the King now here are not yet advised of giving their Judgment in and concerning the Premises, a Day is thereupon given to the Parties aforesaid, before the said Lord the King at *Westminster*, until *Wednesday* next after eight Days from the Day of *St. Martin*, of hearing their Judgment therein, for that the Court of the said Lord the King now here is not yet thereupon, &c. At which Day before the Lord the King at *Westminster* come the said Parties by the said Attornies; upon which all and singular the Premises being seen, and by the Court of the Lord the King now here more fully understood, and mature Deliberation thereupon had, it seems to the Court of the Lord the King here, That the Plea aforesaid, by the said *John* in Manner and Form aforesaid above pleaded, and the Matter in the same contained, are good and sufficient in Law to debar the said *Timothy* from having his said Action against the said *John*. Therefore it is considered, That the said *Timothy* take nothing by his said Bill, but that he for his false Complaint be thereupon in Mercy, &c. And that the said *John* go then without a Day, &c. And it is further considered, that the aforesaid *John* recover against the said *Timothy* six Pounds and ten Shillings for his Costs and Charges in and about his Defence in this Behalf sustained, adjudged by the Court of the said Lord the King now here, to the said *John*, by his Assent, according to the Form of the Statute in such Case made and provided; and that the aforesaid *John* have Execution thereof, &c.

Judgment
for the De-
fendant.

Pleas before our Lord the King and our Lady the Queen at Westminster, of the Term of Easter in the Second Year of the Reign of our Lord William and our Lady Mary, now King and Queen of England. Roll 43.

Payne against Partridge and another.

Cambridgeshire, BE it remembered that heretofore, to wit, in the Term of St. Michael last past, before our Lord the King and our Lady the Queen at Westminster, came Isaac Payne, by Humphry Ambler his Attorney, and brought into the Court of our said Lord the King and Lady the Queen then there his certain Bill against Edward Partridge Esq; and William Boulter, in the Custody of the Marshal, &c. of a Plea of Trespass upon the Case; and there are Pledges of Prosecuting, to wit, John Doe and Richard Roe, which said Bill followeth in these Words, that is to say, Cambridgeshire, to wit, Isaac Payne complains of Edward Partridge Esq; and William Boulter in the Custody of the Marshal of the Marshalsea of our Lord the King and Lady the Queen, before the said King and Queen being, for that, to wit, that whereas the Village of Littleport within the Isle of Ely in the County aforesaid is, and from all the Time whereof the Memory of Man is not to the contrary, was an antient Village, and where within the said Village of Littleport aforesaid there is, and for all the said Time was, an antient River called Wilney River, and upon the same River, and a-crofs the same from the whole Time aforesaid, there was an antient Passage [or Ferry] at the North-east Side of the same Village of Littleport, near the End of a Lane, called Ferry-lane, leading from the Village of Littleport aforesaid to the said River, for the passing and carrying over of the Subjects of this Realm of England, desiring to pass over and beyond the said River, to wit, from a certain Place called the Ferry-lane, from the North-east Part thereof to a certain Place called Adventurous Bank from the North-east Part of the same River overthwart that River, ther forward or backward, at their Will, for the passing over and transporting of their Horses, Mares, and Geldings, which said passing over and transporting from the whole Time aforesaid until late, to wit, the first Day of May in the fifteenth Year of our Lord Charles the Second, late King of England, &c. were had and performed in a Ferry-boat there kept by the Proprietors and Occupiers of the said Passage [or Ferry]; And the Proprietors, Occu-

3 Mod. 289.
1 Show. 243.
255.
Salk. 12.
Comb. 180.
Carth. 191.
Holt 6. S. C.

Declaration
by an Inha-
bitant of Lit-
tleport a-
gainst the
Proprietors
of a Ferry-
boat for not
keeping it in
repair.

Prescription
in a Ferry,
and Toll for
Passage.

Exception of
Inhabitants
in antient
Messuages
from paying
Toll.

The several
Tolls taken.

Prescription
of Exemption
for the
Inhabitants
in the an-
tient Mes-
suages and
Cottages for
free Passage.

That the
Plaintiff is
an Inhabi-
tant in an
antient Mes-
suage.

Breach in
not keeping
the Boat.

piers and Keepers of the said Passage [or Ferry] and Ferry-boat for the Time being, for the better keeping and maintaining the same from the whole Time aforesaid took and were accustomed to take of the said Subjects of this Realm of *England*, so to be passed and transported over and beyond the said River, to wit, from the aforesaid Place called the *Ferry-lane* to the aforesaid Place called *Adventurous Bank*, a-cross the said River (other than of the Inhabitants of the same Village of *Littleport*, residing in antient Messuages or antient Cottages there) certain reasonable Rates, as Toll or Custom, to wit, one Half-penny for every Horse and Man thereupon riding, and for every led Horse, Mare or Gelding, one Farthing; and for every Horse, Mare, or Gelding otherwise loaded one Penny for such Passing and Transporting of them as aforesaid to be received every Time of their passing over beyond the River aforesaid, at the Passage [or Ferry] aforesaid, either forward or backward: And whereas also within the same Village of *Littleport* there is, and from the whole Time aforesaid, whereof the Memory of Man is not to the contrary, there was such an antient Custom, to wit, that the Inhabitants of that Village in antient Messuages or antient Cottages there residing, had and might have and from the whole Time aforesaid were accustomed to have Liberty of passing over the said River at the aforesaid Passage there for themselves, their Horses, Mares, and Geldings in the Ferry-boat aforesaid, so as aforesaid to be transported either forward or backward, at their Pleasure, without any Payment whatsoever for such their passing over so to be had: And whereas also the said *Isaac*, on the first Day of *May* in the second Year of the Reign of our Lord *James* the Second, late King of *England*, and long before and from thence afterwards to this Time was, and still remains one of the Inhabitants of the aforesaid Village of *Littleport* then and still residing in a certain antient Messuage there, and for that Cause and Reason he the said *Isaac*, by Virtue of the said Custom had and hath a Right, and ought to have the Liberty of passing over the said River at the Passage aforesaid, in the Ferry-boat aforesaid, for himself, his Horses, Mares and Geldings in the Form aforesaid, without any Payment whatsoever for the same to be made: Nevertheless the said *Edward* and *William* not being ignorant of the said Custom, but contriving and maliciously intending to the said *Isaac* illegally to burthen and greatly to damnify, and to deprive him of the Liberty of his aforesaid Passing over the said River to be had at the Passage aforesaid in the said Ferry-boat as aforesaid, and also to cause him the said *Isaac* intirely to lose the same on the said first Day of *May* in the second Year aforesaid, and from thence to the Day of exhibiting the said Bill of the said *Isaac* (the said *Edward* and *William*, then and before and afterwards to this Time being Proprietors, Occupiers and Keepers of the Passage [or Ferry] and Ferry-boat aforesaid) had or preserved, or kept the Ferry-boat at the said Passage [or Ferry] for the Passing over

the Subjects of this Realm, and their Horses, Mares, and Geldings aforefaid, willing to pass over and beyond the said River, but have for the Time aforefaid totally omitted and neglected to do, have, preserve or keep the same, and no Ferry-boat for the Time aforefaid, or any Part of that Time, was or yet is, altho' the said *Edward* and *William*, on the said first Day of *May* in the second Year abovefaid, and often afterwards, at *Littleport* aforefaid, were requested by the said *Isaac* to have such Ferry-boat at the Passage aforefaid, and to permit him the said *Isaac* to enjoy his said Liberty there; so that the said *Isaac* from the aforefaid first Day of *May* in the second Year abovefaid, and from thence to this Time was, and yet is hindered and wholly deprived of his Liberty of Passing over the River aforefaid at the said Passage in Form aforefaid, according to the Custom aforefaid to be had, contrary to the said Custom, and to the Damage of him the said *Isaac* of Five hundred Pounds: And thereupon he brings this Suit, &c.

And now at this Day, to wit, *Wednesday* next after fifteen Days from the Day of *Easter* in this same Term, to which Day the said *Edward* and *William* had Leave to imparl to the said Bill and then to answer, &c. before the Lord the King and Lady the Queen at *Westminster*, cometh as well the said *Isaac* by his said Attorney, as the said *Edward* and *William* by *Joseph Sherwood* their Attorney; and the said *Edward* and *William* defend the Force and Injury, when, &c. and say that the aforefaid *Isaac* ought not to have or maintain his Action aforefaid thereupon against them; because protesting that the Passing and Carrying of Persons, Horses, Mares, and Geldings, over and a-cross the said River, were not had or done in any Ferry-boat kept for the Passing over and Transportation of Persons or Cattle in the Place where, and in Manner and Form as by the Declaration aforefaid is above supposed; and protesting that within the said Village of *Littleport* there is not, nor ever was any such Custom as in the Declaration aforefaid is above supposed and alledged; and protesting also that the aforefaid *Isaac* is not, nor ever was one of the Inhabitants of the said Village of *Littleport*, residing in any antient Messuage there in Manner and Form as by the aforefaid Declaration is above supposed, the said *Edward* and *William* for Plea say, that long before the said Time in which, &c. to wit, on the first Day of *May* in the fifteenth Year of the Reign of the said late King *Charles* the Second aforefaid, he the said *Edward*, at his own proper Costs and Charges, erected, built and placed, in and upon the said River and over-thwart the same River at the Passage aforefaid, a certain Bridge made of Wood and Stones for the Use, easement of passing over, and transporting of all and singular the Persons, Horses, Mares, and Geldings, there coming and willing to pass over and beyond the said River at the Passage aforefaid, which said Bridge there so erected and placed the same *Edward* here from Time to Time and at all Times after the making thereof

Impar lance.

Protestation that the Passage was not in a Boat.

Further Protestation, that there is no such Custom; Protestation also, that the Plaintiff was not an Inhabitant in any old Messuage.

Plea that at their own Charge they built a Bridge instead of the Boat, and keep it in Repair more safe for Passage than the Boat.

For which
Reason they
omitted to
keep the
Boat.

thereof to this Time hath well and sufficiently had, preserved and maintained, repaired and kept, and still hath, preserveth, maintaineth and keepeth there, so that the said *Isaac* and all and singular the Persons, Horses, Mares, and Geldings, there coming and willing to pass over and beyond the said River at the Passage aforesaid, from Time to Time and at all Times after the making and placing of the aforesaid Bridge there unto this Time, might and still may there go, return and pass upon, by and over the said Bridge a-cross and beyond the River aforesaid, at the Passage aforesaid, without any Danger, and more safely, better and sooner than in a Ferry-boat: For which Reason the said *Edward* and *William* had preserved or kept no Ferry-boat at the said Passage, but have omitted and neglected to do, have, preserve or keep the same, as they well might, for the Cause aforesaid: And this they are prepared to verify: Wherefore they pray Judgment if the said *Isaac* ought to have or maintain this Action aforesaid thereupon against them &c.

Reply, that
he was not
permitted to
pass over
any Bridge.

And the said *Isaac* saith, that he, notwithstanding any Thing by the said *Edward* and *William* above alledged, ought not to be precluded from having his said Action thereupon against them, because he saith, that he the said *Isaac* was not permitted to have the Liberty of the Passage aforesaid, by any Bridge over and beyond the River aforesaid, according to the Custom in the Declaration before-mentioned, against the Custom aforesaid: And this he is ready to verify: Wherefore he prays Judgment and his Damages by Occasion of the Premises to him to be adjudged, &c.

Demurrer.

And the said *Edward* and *William* say, That the said Plea by the said *Isaac* in Manner aforesaid above in his Replication pleaded, and the Matter in the same contained are not sufficient in the Law to have and maintain the aforesaid Action of him the said *Isaac* against them the said *Edward* and *William*, to which the said *Edward* and *William* need not, nor are by the Law of the Land in any Manner bound to answer: And this they are ready to verify: Wherefore, for Default of a sufficient Replication in the Behalf, the same *Edward* and *William* as before pray Judgment and that the said *Isaac* be precluded from having his said Action against them the said *Edward* and *William*, &c.

Joinder.

And the said *Isaac* saith, That the aforesaid Plea by the said *Isaac* in Manner and Form aforesaid above in his Replication pleaded, and the Matter in the same contained, are good and sufficient in the Law to have and maintain the Action of the said *Isaac* against them the said *Edward* and *William*; which said Plea and the Matter therein contained the same *Isaac* is ready to verify and prove, as the Court, &c. And because the aforesaid *Edward* and *William* have not answered the said Plea, nor have hitherto any Ways denied the same, he the said *Isaac*, as before, prays Judgment and his Damages by Occasion of the Premises to be adjudged to him, &c.

But because the Court of the said Lord the King and Lady the Queen now here are not yet advised of giving their Judgment of and concerning the Premises, a Day therefore is given to the said Parties before the Lord the King and the Lady the Queen at *Westminster*, until *Friday* next after the Morrow of the *Holy Trinity*, of Hearing their Judgment of and concerning the said Premises; for that the Court of the said Lord the King and Lady the Queen now here thereof, not yet, &c. At which Day, before the Lord the King and Lady the Queen at *Westminster*, come the said Parties by their said Attornies: But because the Court of our Lord the King and Lady the Queen, are not yet advised of giving their Judgment of and concerning the Premises, a Day therefore is given to the said Parties before our Lord the King and Lady the Queen at *Westminster*, until *Thursday* next after three Weeks from the Day of *St. Michael*, of hearing their Judgment thereupon, for that the Court of our said Lord and Lady the now King and Queen are not yet thereof, &c. At which Day, before the Lord the King and Lady the Queen at *Westminster*, come the Parties aforesaid by their said Attornies: But because the Court of the said Lord the King and Lady the Queen now here are not yet advised of giving their Judgment of and concerning the Premises, a Day therefore is given to the said Parties before our Lord the King and Lady the Queen at *Westminster*, until *Friday* next after eight Days from the Day of *St. Hillary*, of hearing their Judgment, for that the Court of the said Lord the King and Lady the Queen now here not yet thereupon, &c. At which Day, before the Lord the King and Lady the Queen at *Westminster*, come the aforesaid Parties by their said Attornies: But because the Court of the said Lord the King and Lady the Queen now here are not yet advised of giving their Judgment of and concerning the Premises, a Day therefore is given to the said Parties before the Lord the King and Lady the Queen at *Westminster*, until *Wednesday* next after fifteen Days from the Day of *Easter*, of hearing their Judgment thereupon, for that the Court of the said Lord the King and Lady the Queen now here is not yet thereupon, &c. At which Day, before the Lord the King and Lady the Queen at *Westminster*, come the aforesaid Parties by their said Attornies: But because the Court of the said Lord the King and Lady the Queen now here are not yet advised of giving their Judgment of and concerning the Premises, a Day therefore is given to the said Parties before the Lord the King and Lady the Queen at *Westminster*, until *Saturday* next after eight Days from the Day of the *Holy Trinity*, of hearing their Judgment thereupon, for that the Court of the said Lord the King and Lady the Queen now here not yet thereupon, &c. At which Day, before the Lord the King and Lady the Queen at *Westminster*, come the said Parties by their Attornies aforesaid; upon which all and singular the Premises being seen and more fully understood by the Court of the

Continuances.

Judgment for
Defendant.

said Lord the King and Lady the Queen now here, and mature Deliberation being thereupon had, it seems to the Court of the said Lord the King and Lady the Queen now here, that the afore-
said Plea by the aforesaid *Isaac*, in Manner and Form aforesaid above in his Replication pleaded, and the Matter in the same contained, are not sufficient in the Law to have and maintain the said Action of him the said *Isaac*, against the said *Edward* and *William*: Therefore it is considered, that the said *Isaac* take nothing by his said Bill, but that for his false Complaint he be thereupon in Mercy, &c. and that the aforesaid *Edward* and *William* go hence without a Day, &c.

Pleas before our Lord the King at Westminster, of the Term of St. Hillary in the Seventh Year of the Reign of our Lord William the Third, now King of England, &c. Roll 697.

Hicks against Dowling.

Salk. 13.
Cases B. R.
100. S. C.

Somerset, to wit, **B**E it remembered, That heretofore, to wit, in the Term of *St. Michael* last past, before our Lord the King at *Westminster*, came *Sarah Hicks*, Widow, by *Thomas Callow*, her Attorney, and brought into the Court of our said Lord the King then and there, his certain Bill against *John Dowling*, in the Custody of the Marshal, &c. of a Plea of Trespass upon the Case; and there are Pledges of Prosecuting, to wit, *John Doe* and *Richard Roe*; which said Bill followeth in the Words, that is to say, *Somerset*, to wit, *Sarah Hicks*, Widow complains of *John Dowling*, in the Custody of the Marshal of the *Marshalsea* of our Lord the King, before the King himself being for that, to wit, That whereas the said *Sarah*, on the twenty-sixth Day of *January* in the Year of our Lord One thousand six hundred and ninety-two, was lawfully possessed of and in a certain Messuage, situate, lying and being in *East Dundry* in the County aforesaid, for a certain Term of Years then and yet to come and unexpired; And being so thereof possessed, the same *Sarah* on the same Day and Year aforesaid, at *East Dundry* aforesaid, demised the said Messuage (amongst others) to the aforesaid *John Dowling*; To have and to hold to the same *John Dowling*, from so long live.

Declaration
that she was
lawfully
possessed of a
Messuage for
a Term of
Years, and
demised it
for three
Years to the
Defendant,
if such Per-
sons should
so long live.

the twenty-fifth Day of *March* then next following, for the Term of three Years, if the said *Sarah Hicks* and *John Dowling*, and one *Thomas Dowling* and *Edith*, the Father and Mother of him the said *John Dowling*, should so long live; by Virtue of which said Demise, the aforesaid *John Dowling* afterwards, to wit, on the twenty-sixth Day of *March* in the Year of our Lord One thousand six hundred and ninety-three, entred into the Messuage aforesaid, and thereof (amongst others) was possessed for the said Term of three Years above to him demised, the Reversion thereof belonging to the same *Sarah*, for the Residue of the said Term first above-mentioned: And the said *Sarah* in Fact saith, that as well the said *Thomas Dowling* and *Edith*, as the aforesaid *John Dowling*, are yet in Being and in full Life, to wit, at *East Dundry* aforesaid: Nevertheless the aforesaid *John Dowling*, sufficiently knowing the Premises, but contriving and maliciously intending in this Part very much to damnify and burthen the said *Sarah*, he the said *John Dowling*, on the twentieth Day of *June* in the Year of our Lord One thousand six hundred and ninety-five, (being so as aforesaid possessed of the Messuage abovesaid, and the Reversion thereof belonging to the said *Sarah* in Manner before said) did so negligently and improvidently keep his Fire in the Messuage aforesaid, that by Reason thereof the same Messuage was then burnt and is totally destroyed: Whereupon the said *Sarah* saith, that she is injured and hath Damage to the Value of Five hundred Pounds: And therefore she brings this Suit, &c.

Defendant's Entry and Possession for his Term, the Reversion belonging to the Plaintiff.

Averment of Lives.

Breach in negligent keeping his Fire.

And now at this Day, to wit, *Thursday* next after eight Days from the Day of *Hillary* in this same Term, until which Day the said *John* had Leave to imparl to the said Bill, and then to answer, &c. Before our Lord the King at *Westminster* comes as well the said *Sarah* by her Attorney aforesaid, as the said *John*, by *Samuel Brewster* his Attorney: And the same *John Dowling* defends the Force and Injury, when, &c. And saith that he is not thereof guilty; and of this he puts himself upon the Country; and the aforesaid *Sarah* doth likewise, &c. Therefore let a Jury come thereupon before the Lord the King at *Westminster*, on *Wednesday* next after eight Days from the Day of the Purification of the blessed *Mary*, and who neither, &c. to recognize, &c. because as well, &c. The same Day is given to the said Parties there, &c.

Imparlanee.

Not guilty.

Pleas

Pleas before our Lord the King at Westminster, of the Term of the Holy Trinity in the Ninth Year of the Reign of our Lord William the Third now King of England, &c. Roll 359.

Turbervile against Stampe.

Salk. 13, 647.
Comb. 459.
Garth. 425.
Skin. 681.
Cases B. R.
151.
Holt 9. S. C.

Declaration
upon the Cu-
stoms of the
Realm, for
negligently
keeping a
Fire in the
Defendant's
Close, where-
by the Plain-
tiff's Heath
and Furzes
were burnt.

Dorset, to wit, **B**E it remembered, That heretofore, to wit, in the Term of *Easter* last past, before our Lord the King at *Westminster*, came *Tho. Turbervile* the younger Esq. by *Edward Lawrence*, his Attorney, and brought into the Court of our said Lord the King then there his certain Bill against *John Stampe* Gentleman, in the Custody of the Marshal, &c. of a Plea of *Trespas* upon the Case; and there are Pledges of Prosecuting, to wit, *John Doe* and *Richard Roe*, which said Bill followeth in these Words, that is to say, *Dorset*, to wit, *Thomas Turbervile* the Younger Esq. complains of *John Stampe* Gent. in the Custody of the Marshal of the *Marshalsea* of our Lord the King, before the King himself being, for that, to wit, That whereas according to the Law and Custom of this Realm of *England* hitherto used and approved, every Man of the same Realm is obliged to keep his Fire safe and secure by Day and by Night, lest for Want of the due Keeping of such Fire any Damage in any Manner happen to any Person of the same Realm; and whereas the aforesaid *Thomas*, on the sixth Day of *April* in the ninth Year of the Reign of our Lord *William* the Third, now King of *England* &c. was possessed of a certain Close of Heath lying and being in the Parish of *Stoke* in the County aforesaid: And whereas also the said *John* on the Day and Year aforesaid was in like Manner possessed of a certain other Close of Heath, next adjoining to the said Close of Heath of him the said *Thomas*, in the Parish and County aforesaid, the said *John*, on the Day, Year, and Place aforesaid, so negligently and improvidently kept his Fire in the said Close of Heath of him the said *John*, that for Default of the due Keeping of the said Fire, the Heath and Furzes of the said *Thomas* to the Value of forty Pounds in the said Close of Heath of him the said *Thomas* then growing and being were burnt, to the great Damage of the said *Thomas*, and contrary to the Custom aforesaid. Wherefore he saith, that he is injured and hath Damage to the Value of forty Pounds: And thereupon he brings this Suit, &c.

And now at this Day, to wit, *Friday* next after the Morrow of the *Holy Trinity* in this same Term, until which Day the said *John* had Leave to imparl to the said Bill, and then to answer, &c. before the Lord the King at *Westminster*, comes as well the said *Thomas* by his said Attorney, as the said *John*, by *Samuel Brewster* his Attorney: And the said *John* defends the Force and Injury, when, &c. and saith that he is not thereof guilty; and of this he puts himself upon the Country; and the said *Thomas* likewise, &c. Therefore let a Jury thereupon come before the Lord the King at *Westminster*, on — Day next after —; and who neither, &c. to receive, &c. as well, &c. The same Day is given to the said Parties there, &c.

Nor guilty,
and Issue.

Venire a-
warded.

Afterwards Process being thereupon continued between the said Parties of the aforesaid Plea, by the Jury's being respited there be-
tween them thereupon, before our Lord the King at *Westminster*, until *Saturday* next after three Weeks from the Day of *Saint Michael*, unless the Justices of our Lord the King assigned to take the Assises in the County of *Dorset*, on *Thursday* the twenty-second Day of *July*, at *Dorchester* in the County aforesaid, by the Form of the Statute, &c. should first come for Default of Jurors, &c.

Nisi prius.

At which Day, before the Lord the King at *Westminster*, cometh the said *Thomas Turberville* the Younger, by his said Attorney, and the said Justices before whom, &c. have sent hither their Record before them, had in these Words, to wit, Afterwards on the Day and Place within contained, before Sir *Edward Ward* Knt. Chief Baron of the Exchequer of the Lord the King, and Sir *Thomas Rokeby* Knt. one of the Justices of the Lord the King assigned to hold Pleas before the King himself, Justices of our said Lord the King assigned to take Assises in the County of *Dorset*, by the Form of the Statute, &c. came the within named *Thomas Turberville* the Younger, Esq; by his Attorney within mentioned, and the within written *John Stampe* Gent. although solemnly required, did not come, but made default: Therefore let the Jury whereof mention is made, be taken against him by Default, and the Jurors of that Jury being summoned, some of them, to wit, *Thomas Notting*, *Henry Kelloway*, *Richard Hambourne*, *John Ford*, *David Har- ward*, *Mark Dowland*, *Henry Humber*, *James Squib*, *Robert Woolfrays*, came and are sworn into that Jury; and because the rest of the Jurors of the same Jury did not appear, therefore other Persons then present being chosen for this Purpose are ap-
pointed a-new by the Sheriff of the County aforesaid, at the Re-
quest of the aforesaid *Thomas Turberville*, and by the Mandate of the aforesaid Justices, whose Names are affixed in the Panel with-
in written, according to the Form of the Statute in such Case
made and provided: And a Jury being appointed a-new,
namely, *John Warren*, *William Bussel* and *Nathaniel Payne* sum-
moned in like Manner, come and together with the other Jurors
aforesaid first for this Purpose impanelled and sworn, being chosen,
Vol. II.

Postea and
Verdict.

Defendant's
Default.

Verdict for
the Plaintiff.

Judgment.

Increase of
Damages.

electd, tried, and sworn to speak the Truth touching the within Contents, upon their Oath say, that the aforesaid *John Stampe* is guilty of the within written Premisses, within laid to his Charge as the said *Thomas Turberville* thereupon within complaineth against him, and assess the Damages of him the said *Thomas*, by the Occasion within written, besides his Costs and Charges by him concerning his Suit in this Behalf applied, to eighty Pounds, and for the said Costs and Charges to forty Shillings: Therefore it is considered, that the said *Thomas Turberville* do recover against the aforesaid *John Stampe* his said Damages by the said Jury in Form aforesaid assessed, and also eleven Pounds for his Costs and Charge for the Increase, adjudged by the Court of the said Lord the King now here to the same *Thomas Turberville* by his Assent, which said Damages in the Whole amount to thirty-one Pounds; and the said *John* in Mercy, &c.

Pleas before the Lord the King at Westminster, of the Term of the Holy Trinity in the Tenth Year of the Reign of our Lord William the Third, now King of England, &c. Roll 162.

Robins against Robins.

Salk. 15.
Cases B. R.
273. S. C.

Case for Arresting a Man by Colour of Process and holding him to Bail, where none was required by Law, after tendering a common Appearance.

Cornwal, to wit, **B**E it remembered, That heretofore, to wit, in the Term of *Easter* last past, before our Lord the King at *Westminster*, came *Stephen Robins* Gentleman by *Edward Hblyn* his Attorney, and brought into the Court of the said Lord the King then there his certain Bill against *John Robins* Gentleman, in the Custody of the Marshal, &c. of a Plea of Debt; and there are Pledges of Prosecuting, that is to say, *John Doe* and *Richard Roe*, which said Bill followeth in the Words, to wit, *Cornwal*, to wit, *Stephen Robins* Gentleman complains of *John Robins* Gentleman, in the Custody of the Marshal of the *Marshalsea* of our Lord the King, before the King himself being, for that, to wit, That whereas the said *John* never had any lawful Cause of Action against the same *Stephen*, so that by the Law of this Realm of *England* the Body of the said *Stephen* ought for the same to be taken, and in Prison detained until the said *Stephen* should find sufficient Bail to answer the said *John*

the same Cause: Nevertheless the said *John* knowing the Premises, but contriving and maliciously intending him the said *Stephen* in this Behalf illegally to burthen, oppress and damnify, and to injure and lessen his Credit and Reputation as much as in him was, he the said *John* on the twenty-eighth Day of *May* in the ninth Year of the Reign of our Lord *William* the Third, now King of *England*, &c. at *Bodmyn* in the County aforesaid, caused the same *Stephen*, by Pretence and Colour of a certain Process in the Law, to be arrested; and although he the aforesaid *Stephen* was always ready to appear upon such Process at the Day of the Return thereof to answer the said *John* according to the Exigency of the same Process; yet the said *John* maliciously procured and caused the same *Stephen*, on the Day and Year aforesaid, at *Bodmyn* aforesaid, to be imprisoned, and there in Prison to be detained by the Space of six Months, for that only that the aforesaid *Stephen* could not find sufficient Bail to answer the said *John* upon the said Process; by which the said *Stephen* was forced to expend great Sums of Money for his Sustainance in Prison aforesaid; and the necessary Business of the said *Stephen* for that Time remained undone, and the same *Stephen* in his Manner of Living was greatly injured, to the great Disturbance of his Mind, and the manifest Detriment of his Fame and Credit: Wherefore the said *Stephen* saith that he is injured and hath Damage to the Value of One hundred and fifty Pounds: And therefore he brings Suit, &c.

And now at this Day, to wit, *Friday* next after the Morrow of the *Holy Trinity* in this same Term, until which Day the said *Stephen* had Leave of Imparling to the aforesaid Bill, and then to answer, &c. before the Lord the King at *Westminster*, cometh as well the aforesaid *Stephen* by his said Attorney, as the aforesaid *John* by *Joseph Sherwood* his Attorney; and the said *John* defends the Force and Injury, when, &c. and saith, that he is not thereof guilty; and of this he puts himself upon the Country; and the said *Stephen* thereupon likewise, &c. Therefore let a Jury come thereupon before the Lord the King at *Westminster*, on *Wednesday* next after three Weeks from the Day of the *Holy Trinity*, and who neither, &c. to recognize, &c. because as well, &c. The same Day is given to the said Parties there, &c.

Not guilty
pleaded.

Pleas

Pleas before our Lord the King at Westminster, of the Term of St. Hillary in the Ninth Year of the Reign of our Lord William the Third, now King of England, &c. Roll 437.

Iveson against Moore and others.

Salk. 15.
Comb. 480.
Carth. 451.
Cases B. R.
262.
Holt 10. S.C.

Declaration,
setting forth,
that he was
possessed of a
certain Term
of Years in a
Colliery ad-
joining to
the High-
way.

Yorkshire, to wit, **B**E it remembered that heretofore, to wit in the Term of *St. Michael* last past, before the Lord the King at *Westminster*, came *Henry Iveson* by *Edmund Barker* his Attorney, and brought into the Court of our said Lord the King then there his certain Bill against *John Moore Esq;* and *Ruth* his Wife, *Samuel Wright*, *Jeremiah Lobley*, *Henry Smith* and *Peter Blakey*, in the Custody of the Marshal &c. of a Plea of Trespass upon the Case; and there are Pledges of Prosecuting, namely, *John Doe* and *Richard Ree*, which said Bill followeth in these Words, that is to say, *Yorkshire*, to wit *Henry Iveson* complains of *John Moore Esq;* and *Ruth* his Wife, *Samuel Wright*, *Jeremiah Lobley*, *Henry Smith* and *Peter Blakey* in the Custody of the Marshal of the *Marshalsea* of our Lord the King, before the King himself being, for that, to wit, the whereas the said *Henry Iveson*, on the fourteenth Day of *May* in the ninth Year of the Reign of our Lord *William* the Third, now King of *England*, &c. and long before and always afterwards, unto this Time, was possessed and still is possessed, for a certain Term of Years then and yet to come and unexpired, of and in a certain Colliery and Mine of Coals, being under the Ground and Land and in the Bowels of a certain Close or Land, situate and lying in the Parish of *Whitkirke*, otherwise *Whitchurch* in the County aforesaid, called *Whitkirke*, otherwise *Whitchurch-fields*, and near adjacent to the King's common Highway in the Parish aforesaid, leading on the North Part from the Village of *Wetherby* in the County aforesaid, in, by and over a certain Moor there called *Winnor* and from thence in, by and through a certain Lane there called *Anliffaw Lane*, and from thence in, by and through the Village of *Whitkirke*, otherwise *Whitchurch* aforesaid, and so back again, and also of and in a certain other Colliery and Mine of Coals being under the Ground and Land, and in the Bowels of a certain Close of Moor or Parcel of Land in the Parish aforesaid, called *Hale Moor*, situate and lying, and likewise near adjacent to the King's common Highway aforesaid, leading on the North Part from the Village of *Wetherby* aforesaid, in, by and over the said *Winnor* Moor

Moor, and from thence in, by and through the Lane aforesaid, called *Anlishaw Lane*, and from thence in, by and through the Village of *Halton* in the County aforesaid, and so back again, in, by and through which said Lane called *Anlishaw Lane*, the Coals got and dug out of the Mine aforesaid were wont and intended to be carried and conveyed, as Matters fell out, from the Closes aforesaid, to the Places neighbouring and adjacent: And whereas also on the same fourteenth Day of *May*, the aforesaid *Henry Iveson* had a great Quantity, to wit, Two hundred Cart-Loads of Coals dug out of the Mine aforesaid, severally ready to be exposed to sale in the Closes aforesaid, they the said *John, Ruth, Samuel, Jeremiah, Henry Smith* and *Peter*, being not ignorant of the Premises, but contriving and fraudulently and maliciously intending to hinder, deceive and defraud the same *Henry Iveson* of the Use and Benefit of his Coals aforesaid, and to alienate and seduce the Buyers of the Coals dug out of the Colliery aforesaid from the said Colliery, and to appropriate and procure them to the Colliery of the said *John Moore* near adjacent in the Parish aforesaid, afterwards, to wit, the aforesaid fourteenth Day of *May* in the ninth Year of the Reign of our said Lord the now King aforesaid, did lay and Place four Cart-loads of great Stones, and one Root of a great Ash in the said Way in the Lane aforesaid, at the Parish aforesaid, and continued and permitted the Stones and Root of the Ash aforesaid there to remain for the Space of one Month, by which said Stones, and the Root of the Ash aforesaid, the aforesaid Way, in, by and through the Lane aforesaid, was so much stopped up and obstructed, that the Carts and Carriages for the Carrying and Conveying of the Coals gotten and dug out of the Colliery and Mine aforesaid, could not pass in, by and thro' the said Way, by the Lane aforesaid; by which the same *Henry Iveson* totally lost the Benefit, Profit and Advantage of his said Colliery for the whole Time aforesaid; and the Coals gotten from the Colliery aforesaid, for Want of Buyers, so hindered and obstructed for the Reasons aforesaid, became greatly damaged and depreciated to the Damage of the said *Henry* of fifty Pounds: And therefore he brings Suit, &c.

And had great Quantities of Coals dug ready for Sale.

But the Defendants maliciously intending to hinder Buyers did stop up the Way.

Whereby the Plaintiff lost the Sale of his Coals.

And now at this Day, to wit, *Monday* next after eight Days from the Day of *St. Hillary* in this same Term, until which Day the aforesaid *John Moore* and *Ruth* his Wife, *Samuel, Jeremiah, Henry Smith* and *Peter*, had Leave of Imparling to the said Bill, and then to answer, &c. before the Lord the King at *Westminster*, comes as well the said *Henry Iveson* by his said Attorney, as the aforesaid *John Moore* and *Ruth* his Wife, *Samuel, Jeremiah, Henry Smith* and *Peter*, by *Michael Johnson* their Attorney: And the same *John Moore* and *Ruth, Samuel, Jeremiah, Henry Smith* and *Peter*, defend the Force and Injury, when, &c. and say that they are in no Sort guilty of the Premises above laid to their Charge in Manner and Form as the aforesaid *Henry Iveson* above complains,

Imparlance.

Not guilty pleaded.

plains: And of this they put themselves upon the Country; and the aforesaid *Henry Iveson* likewise, &c. Therefore let a Jury come thereupon before the Lord the King at *Westminster*, on *Saturday* next after the Morrow of the Purification of the Blessed Virgin *Mary*; and who neither, &c. to recognize, &c. because as well, &c. The same Day is given to the said Parties there, &c.

Pleas before the Lord the King at Westminster, of the Term of St. Michael in the Tenth Year of the Reign of our Lord William the Third, now King of England, &c. Roll 125.

Butcher against Andrews.

Salk. 23.
Carth. 446.
Comb. 473.
3 Salk. 15.
Holt 606.
S. C.

Declares in Consideration he would lend the Defendant's Son a Sum not exceeding 5 l. or trust him for Goods of that Value, he would pay.

Essex, to wit, **B**E it remembered, That heretofore, to wit, in the Term of *Easter* last past, before the Lord the King at *Westminster*, came *Thomas Butcher* by *Ralph Cole* his Attorney, and brought into the Court of the said Lord the King then there his certain Bill against *James Andrews*, in Custody of the Marshal of the *Marshalsea*, &c. of a Plea of *Trespas* upon the Case; and there are Pledges of Prosecuting namely, *John Doe* and *Richard Roe*, which said Bill followeth in these Words, that is to say, *Essex*, to wit, *Thomas Butcher* complains of *James Andrews* in the Custody of the Marshal of the *Marshalsea* of our Lord the King, before the King being, for that, to wit, That whereas the aforesaid *James* on the first Day of *August* in the eighth Year of the Reign of our Lord *William the Third*, now King of *England*, &c. at *Gestingthorpe* in the County aforesaid, in Consideration that the same *Thomas Butcher* at the special Instance and Request of him the said *James*, would lend and accommodate to one *George Andrews*, Son of the said *James Andrews*, any Sum or Sums of Money, and would sell and deliver to the same *George* such Goods, Wares and Merchandizes as he the same *George* should want and require, and would Trust the said *George* for the same, so that the said Sums of Money as aforesaid to be lent, and the Value of the said Goods, Wares and Merchandizes to the said *George Andrews* by the aforesaid *Thomas Butcher* to be delivered and sold, should not in the Whole exceed the Sum of five Pounds of lawful Money of *England*.

land, took upon himself, and then and there faithfully promised the same *Thomas Butcher*, that he the aforesaid *James* would well and truly pay and satisfy to the said *Thomas Butcher* not only all such Sums of Money so to be lent and accommodated by him the said *Thomas Butcher* to the said *George Andrews*, but also all such Sums of Money, as the Goods, Wares and Merchandizes aforesaid at the Time of the Sale and Delivery thereof should be reasonably worth, when he afterwards should be requested: And the said *Thomas Butcher* in fact saith, that he the same *Thomas* Butcher afterwards, to wit, on the same first Day of *August* in the eighth Year aforesaid, at *Gestingthorpe* aforesaid in the County aforesaid, at the said special Instance of him the said *James*, did lend and accommodate to the said *George Andrews* the Sum of thirty Shillings of lawful Money of *England*, and on the same Day, Year and Place last aforesaid, at the aforesaid special Instance and Request of him the said *James*, sold and delivered to the same *George Andrews* divers Goods, Wares and Merchandizes, and trusted the aforesaid *George* for the same; and that the Goods, Wares and Merchandizes aforesaid, at the Time of the Selling and Delivery thereof, were reasonably worth the Sum of three Pounds and ten Shillings of like lawful Money of *England*, to wit, at *Gestingthorpe* aforesaid in the County aforesaid, whereof the said *James* afterwards, that is to say, on the same first Day of *August* in the Year aforesaid, at *Gestingthorpe* aforesaid in the County aforesaid, then and there had Notice by the same *Thomas Butcher*: And whereas also the said *James* afterwards, to wit, on the same first Day of *August* in the eighth Year aforesaid, at *Gestingthorpe* aforesaid in the County aforesaid, was indebted to the same *Thomas Butcher* in five Pounds of like lawful Money of *England*, for such Sum of Money of him the said *Thomas Butcher* by the aforesaid *Thomas Butcher*, at the like special Instance and Request of him the said *James*, to the same *George Andrews* before that Time lent and accommodated; and also was indebted to the same *Thomas Butcher* in other five Pounds of like lawful Money of *England*, for divers Goods, Wares and Merchandizes by the said *Thomas Butcher* to the aforesaid *George Andrews*, at the like special Instance and Request of the same *James*, before that Time sold and delivered; and the said *James* being so indebted to the said *Thomas Butcher*, he the said *James* in Consideration thereof afterwards, to wit, on the same first Day of *August* in the eighth Year aforesaid, at *Gestingthorpe* aforesaid in the County aforesaid, took upon himself and then and there in like Manner lawfully promised that he the said *James* would well and faithfully pay and satisfy the aforesaid several Sums of five Pounds, and five Pounds last mentioned, to the same *Thomas Butcher*, when afterwards he should be thereunto requested: And whereas also the said *James* afterwards, to wit, on the same first Day of *August* in the eighth Year aforesaid, at *Gestingthorpe* aforesaid in the County aforesaid, was

Averment.

Indeb. Assumpsit for 5 l. lent the Son at the Plaintiff's Request.

Indebitatus Assumpsit for other 5 l. laid out, &c. was

Breach.

was indebted to the same *Tho. Butcher* in other five Pounds of lawful Money of *England*, for so much Money of him the said *Thomas Butcher*, by the same *Thomas Butcher*, at the like special Instance and Request of the said *James*, for the same *James* before that Time expended and laid out; and he the said *James* being thereupon so indebted to the same *Thomas Butcher*, he the said *James* in Consideration thereof afterwards, to wit, the same Day and Year last abovesaid, at *Gestingthorpe* abovesaid in the County abovesaid, did take upon himself and then and there in the like Manner did faithfully Promise the said *Thomas Butcher* that he the said *James* would well and truly pay and satisfy the abovesaid five Pounds last mentioned to the same *Thomas Butcher* when he should be afterwards thereunto requested: Nevertheless the abovesaid *James* in no wise regarding his several Promises and Undertakings abovesaid in Form abovesaid made, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *Thomas Butcher*, hath not yet paid the abovesaid several Sums of Money, or any Part thereof, to the said *Thomas Butcher*, nor hath hitherto in any wise contented him for the same (although to do this the same *James* afterwards, to wit, on the second Day of *August* in the eighth Year abovesaid, at *Gestingthorpe* abovesaid in the County abovesaid, was requested by the same *Thomas Butcher*) but hath hitherto altogether refused and still doth refuse to pay them to him, or any ways to content him for the same, to the Damage of him the said *Thomas Butcher* thirty Pounds: And therefore he brings Suit, &c.

Non Assumpsit pleaded.

And now at this Day, to wit, *Monday* next after three Weekes from the Day of *St. Michael* in this same Term, until which Day the abovesaid *James* had Leave to imparl to the abovesaid Bill, and then to answer, &c. before our Lord the King at *Westminster* comes as well the abovesaid *Thomas* by his said Attorney, as the abovesaid *James* by *John Clarke* his Attorney: And the same *James* defends the Force and Injury, when, &c. And saith that he did not take upon himself in Manner and Form as the abovesaid *Thomas* above complains against him: And of this he puts himself upon the Country; and the abovesaid *Thomas* in like Manner, &c. Therefore let a Jury come thereupon before the Lord the King at *Westminster*, on — next after — and whether, &c. to recognize, &c. because as well, &c. The same Day is given to the Parties abovesaid there, &c.

pleas before our Lady the Queen at Westminster, of the Term of St. Hillary in the First Year of the Reign of our Lady Anne, now Queen of England, &c. Roll 435.

Coggs against Bernard.

Middlesex, to wit, **B**E it remembered, That heretofore, to wit, Salk. 26.
in the Term of *St. Michael* last past, be- 3 Salk. 11,
fore our Lady the Queen at *Westminster*, came *John Coggs* by 268.
Joseph Sherwood his Attorney, and brought into the Court of our Holt 13, 131,
said Lady the Queen then there his certain Bill against *William* 528. S. C.
Bernard, in the Custody of the Marshal, &c. of a Plea of 'Tres-
pass upon the Case; and there are Pledges of Prosecuting, that is
to say, *John Doe* and *Richard Roe*; which said Bill followeth
in these Words, that is to say, *Middlesex*, to wit, *John Coggs* com-
plains of *William Bernard*, in the Custody of the Marshal of the
Marshalsea of our Lady the Queen, before the Queen herself being,
for that, to wit, That whereas the aforesaid *William*, on the tenth
Day of *November* in the thirteenth Year of the Reign of our Lord
William the Third, late King of *England*, &c. at the Parish of *St.*
Clement Danes in the County of *Middlesex* aforesaid, had underta-
ken safely and securely to take up divers Casks of Brandy of the said
John, then being in a certain Cellar situate in a certain Place cal-
led *Brooks-Market* in the Parish of *St. Andrew Holbourn* in the
County aforesaid; and had undertaken to put the same safely and
securely in a certain other Cellar situate in a certain other Place
called *Water-street* in the Parish of *St. Clement Danes* in the
County aforesaid, the same *William*, his Servants and Agents af-
terwards, to wit, the same Day and Year, at the Parish of *Saint*
Clement Danes aforesaid, handled the Casks of Brandy aforesaid
so negligently and improvidently in putting them in the Cellar last
mentioned, that for Want of good Care of the said *William*, his
Servants and Agents, one of the said Casks of Brandy then and
there was broken, and a great Quantity, to wit, One hundred and
fifty Bottles of the Brandy aforesaid in the same Cask was by that
Occasion poured out upon the Ground and spoiled. And whereas
also the aforesaid *William*, afterwards, to wit, on the same tenth
Day of *November* in the thirteenth Year aforesaid, at *St. Clement*
Danes aforesaid in the County of *Middlesex* aforesaid had under-
taken safely and securely to take up divers other Casks of Brandy
of the said *John*, then being in a certain other Cellar situate in a

Declaration
upon Defen-
dant's Pro-
mise to take
Hogsheads
of Brandy
out of one
Cellar and
safely put
them in an-
other; for
Negligence.

certain Place called *Brooks-Market* in the Parish of *St. Andrew Holborn* in the County aforesaid, and to place those Casks there on a Carr to be carried to a certain other Cellar situate in a certain other Place called *Water-street* in the Parish of *St. Clement Danes* in the County aforesaid, and the said Casks so as aforesaid carried to the last mentioned Cellar situate in *Water-street* aforesaid, from the said Carr safely and securely there to let down, and place in the Cellar last mentioned; the same *William*, his Servants and Agents afterwards, to wit, the same Day and Year aforesaid, at the Parish of *St. Clement Danes* aforesaid in the County aforesaid, so negligently and improvidently handled the said Casks of Brandy last mentioned in laying them in the Cellar last mentioned, that for Want of due Care of the said *William*, his Servants and Agents, one of the same Casks of Brandy last mentioned was then and there broken, and a great Quantity, to wit, One hundred and fifty Bottles of the Brandy last mentioned being in the same Cask last aforesaid, was by that Occasion then and there spilt upon the Ground and destroyed: Wherefore the said *John* saith, that he is injured and hath Damage to the Value of One hundred Pounds: And therefore he brings Suit, &c.

And now at this Day, to wit, *Saturday* next after eight Days from the Day of *Saint Hillary* in this same Term, until which Day the said *William Bernard* had Leave of Imparling to the said Bill, and then to answer, &c. before our Lady the Queen at *Westminster* comes as well the aforesaid *John Coggs* by his said Attorney, as the said *William Bernard* by *William Collier* his Attorney; and the same *William Bernard* defends the Force and Injury, when, &c. and saith, that he is not guilty thereof; and on this he putteth himself upon the Country; and the before said *John Coggs* in like Manner, &c. Therefore let a Jury thereupon come before our Lady the Queen at *Westminster*, on *Monday* next after the Morrow of the Purification of the Blessed *Mary*, and who neither, &c. to recognize, &c. because as well, &c. The same Day is given to the Parties aforesaid there, &c.

Postea continued.

Afterwards Process thereon is continued between the Parties aforesaid of the Plea aforesaid by the Jury respited thereupon between them before our Lady the Queen at *Westminster*, until *Thursday* next after the Morrow of the Purification of the Blessed *Mary* then next following, unless the Trusty and well beloved of our Lady the Queen Sir *John Holt*, Knt. Chief Justice of our Lady the Queen appointed to hold Pleas in the Court of our said Lady the Queen, before the Queen herself, come before on *Wednesday* next after eight Days from the Day of the Purification of the Blessed *Mary* at *Westminster* aforesaid in the County of *Middlesex* aforesaid, in the great Hall of Pleas there, according to the Form of the Statute, &c. for Want of Jurors, &c.

Postea returned.

At which Day before our Lady the Queen at *Westminster* comes the aforesaid *John Coggs* by his said Attorney, and the aforesaid Chief Justice

Justice of our Lady the Queen, before whom, &c. sent here his Record before him had in these Words, Afterwards, at the Day and Place within contained before *John Holt*, Knt. Chief Justice within written, having associated to himself *John Ince*, Gent. by Form of the Statute, &c. comes as well the within named *John Coggs* as the within named *William Bernard*, by their Attornies within mentioned: And the Jurors of that Jury being summoned likewise come, who being chosen, tried, and sworn to speak the Truth of the within Contents, upon their Oath say, that the aforesaid *William Bernard* is guilty of the Premisses, within laid to his Charge, in Manner and Form as the aforesaid *John Coggs* within thereupon complaineth against him, and assess the Damages of him the said *John Coggs*, by Occasion thereof, besides his Costs and Charges by him applied about his Suit in this Behalf, to ten Pounds, and for those Costs and Charges to twenty Shillings: Therefore it is considered, that the said *John Coggs* do recover against the aforesaid *William Bernard* the Damages aforesaid by the said Jury in Form aforesaid assessed, and also twenty and one Pounds adjudged by the Court of the said Lady the Queen now here, to the same *John Coggs* for his Costs and Charges aforesaid, by his Assent, of Increase, which said Damages in the Whole amount to thirty-two Pounds; and the said *William Bernard* in Mercy, &c.

Judgment
for the
Plaintiff.

Pleas before the Lord the King at Westminster, of the Term of the Holy Trinity in the Ninth Year of the Reign of William the Third, now King of England, &c.

Harrison against Cage.

Cambridgeshire, to wit, **B**E it remembered, That heretofore, to wit, in the Term of *Easter* in the ninth Year of the Reign of our Lord *William* the Third, now King of England, &c. before the Lord the King at *Westminster* came *Henry Harrison*, Gentleman, by *Michael Johnson* his Attorney, and brought into the Court of the said Lord the King then there his certain Bill against *Adlard Cage* Gentleman, and *Elizabeth* his Wife, in the Custody of the Marshal, &c. of a Plea of *Trespas* upon the Case; and there are Pledges of Prosecuting, to wit,
John

5 Mod. 411.
Salk. 24.
Carth. 467.
Cases B. R.
214.
Holt 456.
S. C.

Case against
Husband and
Wife upon a
Promise of
Marriage by
her when
sole.

Breach.

Request and
Refusal,

And marry-
ing the De-
fendant.

Indeb. As-
sump. for
Money laid
out for and
lent to her
when sole.

John Doe and *Richard Roe*, which said Bill followeth in these Words, that is to say, *Cambridgeshire*, to wit, *Henry Harrison* Gentleman complains of *Adlard Cage* Gentleman, and *Elizabeth* his Wife, in the Custody of the Marshal of the *Marshalsea* of the Lord the King, before the King himself being, for that, to wit, That whereas the aforesaid *Elizabeth*, whilst she was sole, to wit, on the first Day of *April* in the eighth Year of the Reign of our Lord *William* the Third, now King of *England*, &c. at *Borough-green* in County aforesaid (in Consideration that the same *Henry* then and still being a Bachelor and not married, at the special Instance and Request of the said *Elizabeth* then and there had agreed with the same *Elizabeth*, and had taken upon himself and faithfully promised the same *Elizabeth*, that he the same *Henry* would marry the said *Elizabeth*) took upon herself and then and there faithfully promised that she the said *Elizabeth* would marry him the said *Henry*; and although the said *Henry*, giving Credit to the Promise and Assumption of the said *Elizabeth*, altogether refused to contract Matrimony with any other Woman, and yet continueth a Bachelor and unmarried, and always from the Time of making the Promise and Assumption aforesaid (whilst the said *Elizabeth* was single) was ready and often offered legally to marry the same *Elizabeth*, to wit, at *Borough-Green* aforesaid in the County aforesaid; nevertheless the said *Elizabeth*, whilst she was sole, not regarding her Promise and Assumption aforesaid, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *Henry* in this Behalf, hath not married him the said *Henry* (although so to do the aforesaid *Elizabeth* after her Promise and Assumption aforesaid made, to wit, on the twenty-ninth Day of *April* in the eighth Year aforesaid and often before and afterwards, at *Borough-Green* aforesaid in the County aforesaid, was by the said *Henry* required) but altogether refused to marry him, and afterwards, to wit, on the first Day of *October* in the eighth Year aforesaid, at *Borough-Green* aforesaid in the County aforesaid, married the aforesaid *Adlard* contrary to the aforesaid Promise and Assumption of the same *Elizabeth*: And whereas also the aforesaid *Elizabeth*, whilst she was sole, to wit, on the first Day of *May* in the eighth Year aforesaid, was indebted to the same *Henry* in Three hundred Pounds of lawful Money of *England* for Money by him the said *Henry*, at the special Instance and Request of the said *Elizabeth* and for the same *Elizabeth* (while she was sole before that Time paid and laid out, and for Money by the same *Elizabeth*, while she was sole, before that Time borrowed and received of the said *Henry*, and being so indebted thereupon the said *Elizabeth* (while she was sole) on the same Day and Year last mentioned, at *Borough-Green* aforesaid in the County aforesaid, in Consideration thereof undertook and then and there faithfully promised the said *Henry*, that she the said *Elizabeth* would well and faithfully pay and satisfy to the said *Henry* the same Three hundred Pounds

Pounds: Nevertheless the same *Elizabeth* (while she was sole) and the aforesaid *Adlard* and *Elizabeth*, after the Marriage between them celebrated, not regarding the Promise and Undertaking of the said *Elizabeth* last mentioned in Form aforesaid made, but contriving and fraudulently intending the same *Henry* in this Behalf craftily and subtilly to deceive and defraud, the before said Three hundred Pounds have not paid, nor hath either of them paid any Part thereof to the said *Henry* (although often requested) but have altogether refused and yet do refuse to pay the same to him, or any wife to content him for the same: Wherefore the said *Henry* saith, that he is injured and hath Damage to the Value of Three thousand Pounds: And thereupon he brings Suit, &c.

And now at this Day, to wit, *Wednesday* next after the Morrow of the *Holy Trinity* in this same Term, until which Day the aforesaid *Adlard* and *Elizabeth* had Leave to imparl to the said Bill, and then to answer, &c. before the Lord the King at *Westminster* comes as well the said *Henry* by his Attorney aforesaid, as the aforesaid *Adlard* and *Elizabeth* by *Richard Edwards* their Attorney: And the same *Adlard* and *Elizabeth* defend the Force and Injury, when, &c. and say that the aforesaid *Elizabeth* did not take upon herself in Manner and Form as the aforesaid *Henry* above complains against them; and of this they put themselves upon the Country; and the said *Henry* in like Manner, &c. Therefore let a Jury come thereupon before the Lord the King at *Westminster*, on *Wednesday* next after three Weeks from the Day of the *Holy Trinity*; and who neither, &c. to recognise, &c. because as well, &c. The same Day is given to the aforesaid Parties there, &c. Afterwards the Proceedings thereon are continued between the aforesaid Parties of the Plea aforesaid by the Jury respited thereupon between them, before the Lord the King at *Westminster*, until *Monday* next after three Weeks from the Day of *St. Michael* from thence next following, Unless the Justices of the Lord the King appointed to take Assizes in the County aforesaid, do first come on *Thursday* the eleventh Day of *August* at the Castle of *Cambridge* in the County aforesaid, by Form of the Statute, &c. for Want of Jurors, &c. At which Day, before the Lord the King at *Westminster*, comes the said *Henry* by his said Attorney, and the before said Justices before whom, &c. have sent here their Record had before them in these Words, to wit, Afterwards at the Day and Place within contained, before *Sir Edward Ward*, Knt. Chief Baron of the Exchequer of our Lord the King, and *Thomas Knight* Esq; for this Turn Associate to the said *Sir Edward Ward*, and *Sir Thomas Rokeby* Knt. one of the Justices of the said Lord the King appointed to hold Pleas before the King himself, the Justices of our said Lord the King appointed to take Assizes in the County of *Cambridge* by Form of the Statute, &c. the Presence of the said *Thomas Rokeby* not being expected, by Virtue of the Writ of the said Lord King of *Si non omnes*, cometh the within named *Henry*

Postea con-
tinued.

Postea re-
turned.

Defendants
Default.

Verdict for
the Plaintiff.

Judgment.

A Writ of
Error in the
Exchequer-
Chamber.

Error as-
signed.

Harrison by his Attorney within mentioned, and the within written *Adlard Cage* and *Elizabeth* his Wife, although solemnly required, do not come, but have made Default: Therefore let the Jury whereof Mention is within made be taken against them by Default; Upon which the Jurors of that Jury being likewise summoned come, who being chosen, tried and sworn to speak the Truth of the within Contents, upon their Oath say, that the aforesaid *Elizabeth* did take upon herself in Manner and Form as the aforesaid *Henry* within complains against the said *Adlard* and *Elizabeth*, and assesses the Damages of the same *Henry* by Occasion of the Non-performance of the Promises and Undertakings within specified, besides his Costs and Charges by him about his Suit in this Behalf applied, to Four hundred Pounds, and for those Costs and Charges to forty Shillings: Therefore it is considered, that the aforesaid *Henry Harrison* do recover against the aforesaid *Adlard Cage* and *Elizabeth* his Wife his aforesaid Damages by the Jury aforesaid in Form aforesaid assessed, and also sixteen Pounds for his Costs and Charges aforesaid, adjudged by the Court of our said Lord the King now here to the said *Henry* by his Assent, of Increase, which Damages in the Whole amount to Four hundred and eighteen Pounds; and the aforesaid *Adlard* and *Elizabeth* in Mercy, &c.

Afterwards, to wit, on *Saturday* the twenty-sixth Day of *November* in the tenth Year of the Reign of our Lord *William* the Third, now King of *England*, &c. Transcripts of the Record and Proceedings aforesaid between the Parties aforesaid of the Plea aforesaid, with all Things thereunto belonging, by Pretence of a certain Writ of the said Lord the King, of correcting Errors prosecuted by the aforesaid *Adlard* and *Elizabeth* in the Premises before the Justices of the said Lord the King of the Common Pleas, and the Barons of the Exchequer of the said Lord the King of the Degree of the Coif in the Chamber of the Exchequer aforesaid, according to the Form of the Statute made in the Parliament of our Lady *Elizabeth*, late Queen of *England*, &c. held at *Westminster* on the twenty-third Day of *November* in the twenty-seventh Year of her Reign, were transmitted from the aforesaid Court of the said Lord the King here, before the King himself; and the aforesaid *Adlard* and *Elizabeth* appearing in the same Court of Exchequer-Chamber, assigned certain Matters for Error to be had on the Record and Process aforesaid, for revoking and making void the Judgment aforesaid, to which the aforesaid *Henry* likewise appearing in the same Court of Exchequer-Chamber aforesaid hath pleaded that there was nothing in any wise erroneous, either in the Record and Proceedings aforesaid, or in the giving of the Judgment aforesaid; and afterwards, to wit, on *Tuesday* the twenty-seventh Day of *June* in the eleventh Year of the Reign of our Lord *William* the Third, now King of *England*, &c. as well the Record and Proceedings aforesaid, and the Judgment given upon the same, as the aforesaid

aforesaid Causes by the said *Adlard* and *Elizabeth* assigned and alledged for Error, being seen, and by the Court of Exchequer-Chamber aforesaid diligently examined and more fully understood; It seemed to the same Court of Exchequer-Chamber aforesaid, that the said Record is in no wise faulty or defective, and that the said Record was not any wise erroneous: Therefore it was then and there by the same Court of Exchequer-Chamber aforesaid considered, That the Judgment aforesaid should in all Respects be affirmed and stand in all its Force and Effect, the said Causes and Matters by the aforesaid *Adlard* and *Elizabeth* assigned and alledged for Error in any wise notwithstanding; And it was further then and there by the same Court considered, that the aforesaid *Henry* should recover against the said *Adlard* and *Elizabeth* ten Pounds and ten Shillings, adjudged by the Court there to the said *Henry* by his Assent, according to the Form of the Statute for that Purpose made and provided, for his Damages, Costs and Charges, which he had by Occasion of the Delay of Execution of the Judgment aforesaid, by Pretence of the Prosecution of the said Writ of Error; And thereupon the aforesaid Record, and also the Proceedings of the said Justices of the Common Pleas aforesaid, and the said Barons of the Exchequer aforesaid, had before them in the Premises before the Lord the King wheresoever, &c. were then by the same Justices and Barons sent back according to the Form of the Statute, &c. and do now remain in the Court of the Lord the King here before the King himself, &c. Afterwards, to wit, on *Wednesday* next after three Weeks from the Day of the *Holy Trinity* in the thirteenth Year of the Reign of our Lord *William* the Third, now King of *England*, &c. before the said Lord the King at *Westminster* cometh the aforesaid *Henry Harrison* by his said Attorney, and acknowledgeth himself to be satisfied by the aforesaid *Adlard* and *Elizabeth*, concerning the Debt, Damages, Costs and Charges aforesaid: Therefore let the same *Adlard* and *Elizabeth* be thereupon acquitted of the said Debt, Damages, Costs and Charges, &c.

Judgment affirmed.

Costs adjudged, occasioned by the Delay of Execution and Remittance of the Record.

Satisfaction acknowledged.

Pleas

Pleas before our Lady the Queen at Westminster, of the Term of St. Michael in the First Year of the Reign of our Lady Anne, now Queen of England, &c. Roll 223.

Justin against Ballin.

Salk. 34.
S. C.

Suggestion
setting forth
Statute of
13 Rich. 2.
whereby the
Admiralty
have no Cog-
nizance of
any Thing
done upon
the Land.

Another Sta-
tute (15
R. 2.) to the
same Pur-
pose.

Another Stat.
(2 H. 4.) con-
firming the
former.

England, to wit, **BE** it remembered, That on Friday next after three Weeks from the Day of St. Michael in this same Term, before our Lady the Queen at Westminster comes *Nicholas Justin* in his proper Person, and causes the Court of the said Lady the Queen now here to understand and be informed, That whereas in the Statute made in the Parliament of our Lord *Richard* the Second, late King of *England* after the Conquest, held in the thirteenth Year of his Reign at Westminster in the County of *Middlesex*, it is amongst other Things ordained and enacted by the Authority of the same Parliament, that Admirals and their Deputies from thence afterwards should in no Sort intermeddle concerning any Thing done within the Kingdom of *England*, save only concerning a Thing done upon the Sea, as was of Right accustomed in the Time of our Lord *Edward* late King of *England*, Grandfather of the same Lord the King *Richard* the Second, as in the same Statute amongst other Things is more fully contained: And whereas also by another Statute made in the Parliament of the aforesaid late King *Richard* the Second in the fifteenth Year of his Reign, held at Westminster aforesaid in the said County of *Middlesex*, it is amongst other Things declared, ordained and established, that the Court of Admiralty should have no Cognizance, Power or Jurisdiction of all Contracts, Pleas and Complaints, and of all other Things done or arising within the Bodies of Counties, as well by Land as by Water, and also of the Wreck of the Sea, but that all such Contracts, Pleas and Complaints, and all other Things arising within the Bodies of Counties as well by Land as Water, as aforesaid, and also Wreck of Sea should be determined, tried, discussed and remedied by the Law of the Land, and not before the Admiral or Admirals, nor by his Lieutenant in any Manner as in the same Statute is also amongst other Things more fully contained: And whereas also in the Parliament of our Lord *Henry* the Fourth, late King of *England* after the Conquest, held in the second Year of his Reign at Westminster in the County aforesaid, it is amongst other Things ordained and enacted, that the aforesaid Statute of the aforesaid

Year of our said late King *Richard* the Second, should be held and kept and carried into due Execution as in the same Statute amongst other Things is contained: And whereas also all and singular Pleas and Affairs touching or concerning the Validity, Explanation, Interpretation, Construction or Exposition of any Statutes in all Parliaments whatsoever of our said Lady the now Queen, or her Progenitors, late Kings or Queens of *England*, enacted, made and provided, and all and singular Pleas and Conusance of Pleas for any Trespasses, Contracts, Trespasses upon the Case, for the Taking, Detaining or Converting of any Goods or Chattels, or for any other Cause whatsoever, as well upon Land as upon Water, within the Body of any County within this Kingdom of *England*, or elsewhere upon Land, happening, arising, emerging, done or brought to any Person or Persons, do specially belong and appertain to our Lady the now Queen and her Royal Crown, and by the Laws and Statutes of this Realm of *England* ought, and from Time past always hitherto were accustomed to be tried, determined and discussed in the Queen's Temporal Courts of Record, before the Lady the Queen now here, or before her Temporal Justices or Judges, and not before the Lord Admiral of *England*, nor by the Admiral of *England*, or his Lieutenant or Deputy in any Manner: Nevertheless one *John Ballam* and one *William Hart* not being ignorant of the Premises, but contriving unjustly to burthen, oppress and aggrieve the said *Nicholas Justin*, contrary to the due Course of the Law of this Kingdom of *England*, and contrary to the Form of the several Statutes aforesaid, and to draw the Conusance of a Plea which specially belongs and appertains to our said Lady the now Queen and her Royal Crown to another Examination in the Court of Admiralty, before the Right Honourable Sir *Charles Hedges*, Knt. Doctor of Laws and supreme Judge of the Court of Admiralty of *England*, or his Deputy or Surrogate, or some other competent Judge in that Behalf, by Virtue of a certain Process out of the said Court of Admiralty, for the Prosecution of a Ship called *The Swan of Norway*, whereof *Berent Gertson* lately was, but *John Orce*, otherwise *Ord*, otherwise *Larwick* is now Master, and its Rigging and Appurtenances; and the said *Nicholas Justin* being Owner of the said Ship, for and concerning divers Wares and Merchandizes, Works and Labours by the aforesaid *J. Ballam* and *W. Hart* sold, delivered, done, found and provided for the said Ship, out of the Jurisdiction of that Court, unjustly drew into Plea, warily and craftily Libelling and Suggesting against the said Ship, and the aforesaid *Nicholas Justin* in the same Court of Admiralty, amongst other Things, as followeth, that is to say: *First*, That in the Month of *November* in the Year of our Lord One thousand seven hundred, and for several Months before and after the said *Berent Gertson* of *Norway* was the Master and Commander of the said Ship the *Swan*, and had the Care and Government of her as Master, and was put in and appointed Master of her by her Owner,

That the Exposition of the Statutes belongs to the Courts Temporal.

Breach.

By Process out of the Admiralty for Goods and Labour.

Libel set forth.

who

who was then an Inhabitant of *Norway* and a Subject of the King of *Denmark*, but is since dead, and so much the said *Brent Gertson* hath confessed and declared, and this was and is true, publick and notorious, and alledges every Thing jointly and severally: *Also*, That in the said Month of *November* in the Year of our Lord One thousand seven hundred, the said Ship the *Swan* being upon the high and open Seas near the Port of *London*, within the Jurisdiction of the High Court of the Admiralty of *England*, and then standing in great Need of a new Cable, a Coil of small Ratlin, a new Anchor and the other Things mentioned in the two Schedules hereunto annexed, the said *John Ballam* and *William Hart* did thereupon, at the special Instance and Request of the said *Berent Gertson*, then Master and Commander of the said Ship upon the high and open Seas, and within the Jurisdiction aforesaid, furnish and supply the said Ship with the Cable, Anchor, and other Things mentioned in the said two Schedules, at the respective Rates schedule, to wit, the said *John Ballam* furnished and supplied her with the Cable, small Ratlin, and the other Things mentioned in the first of the said Schedules, N^o 1, and at the Rates there set down amounting in all to the Sum of One hundred and four Pounds fifteen Shillings Sterling, and the said *William Hart* furnished and supplied her with the Anchor and the other Things mentioned in the said other Schedule N^o 2, and at the Rates there set down, amounting in the whole to the Sum of nineteen Pounds eleven Shillings and Six-pence Sterling, and the said Cable, Anchor, and other Things mentioned in the said two Schedules, were at the Time and Place aforesaid sent and delivered by the said *John Ballam* and *William Hart*, or their Order, on board the said Ship, and have ever since and now are belonging to her and applied to her Use, and the same were, at the Time of their being sent and delivered on board the said Ship, really and truly worth the respective Rates and Sums of Money schedule, and the like Sort of Goods were then usually sold at the same Rates; and this was and is true, publick and notorious, and so much the said *Berent Gertson* hath confessed and declared to several Persons, but lays it of other good Sums at the Time and Place, &c. and as above: *Also*, That the said Ship the *Swan*, shortly after the said Cable, Anchor, and the other Things mentioned in the said two Schedules, were sent and delivered on board her as aforesaid, proceeded to *Norway*, and did then and ever, and now doth belong to that Place, and the said *Berent Gertson* her late Master did, and do all reside in *Norway*, and were and are Subjects to the King of *Denmark*; and this was and is true, publick and notorious, and so much the said *John Orce* otherwise *Ord*, otherwise *Larwick*, hath lately confessed and declared to several Persons and sets forth as above: *Also*, That the said several Sums of Money mentioned in the said two Schedules, in all amounting in the Whole to the Sum of One hundred twenty-four Pounds six Shillings and Six-pence Sterling, are really and truly due to the said *John Ballam*

and *William Hart*, for the said Cable, Anchor, and the other Things
 schedule, and the said *John Orce*, otherwise *Ord*, otherwise *Lar-*
wick, the present Master of the said Ship hath lately confessed and de-
 clared to several Persons, that the aforesaid Sums of Money are yet
 unpaid, and that it is so set down in Instructions given him by the said
Nicholas Justin the Owner of the said Ship, or to that effect, as be-
 fore: Also, That the said *John Ballam* and *William Hart* have se-
 veral Times demanded the Sums of Money due to them as afore-
 said, of the present Master of the said Ship, personally, and of her
 said Owner by Letters, but they refusing or delaying to pay for the
 same, and the said *John Ballam* and *William Hart* having no Re-
 medy for the Recovery thereof but by arresting the said Ship in the
 High Court of Admiralty of *England*, have caused the same to be
 arrested by Virtue of a Warrant from the said Court, and all Per-
 sons having or pretending to have any Right, Title, or Interest there-
 in, to be duly cited to appear in the said Court to answer to them
 the said *John Ballam* and *William Hart*, in a Cause or Causes civil
 and maritime; and the said *Nicholas Justin* hath there appeared by
 his Proctor and submitted himself to the Jurisdiction of the said
 Court, and as Owner of the said Ship given Bail to answer the Ac-
 tion brought by the said *John Ballam* and *William Hart* against
 the said Ship, and to abide by the Judgment of the said Court, and
 to pay what shall be adjudged, together with the Expences of Suit,
 and thereupon procured the said Ship to be released from the said
 Arrest, as by the Proceedings of the said Court, to which the Party
 proponent refers himself, doth appear.

N^o 1, *Delivered for the Use of the Ship Swan of Longfound, Mr. Be-*
rent Gertson Commander, November the 16th 1700. per John
Ballam.

C. q. lb.

59 1 10 A Cable of 15, in full 120 Fathom.

00 1 03 A Coil of small Ratlin.

l. s. d.

59 2 13 at 35 s. per Hundred is

104 6 8

One Hand-line, 4 Skains of Marlin and Housen.

00 3 4

Lighteridge on Board.

00 5 0

104 15 0

N^o 2,

N^o 2, *Smith's Work to the Ship Swan*, Berent Gertson Master,
November the 25th 1700. by William Hart.

	l.	s.	d.
For one new Anchor weighing 13 C. 24 lb. per Contract.	19	00	4
For One hundred Five-Inch Nails.	00	4	2
For One hundred Four-Inch Nails.	00	2	6
For Two hundred of Nails.	00	3	0
For mending one Pump-Iron.	00	1	6
	19	11	6

Averment,
That the
Goods and
Work were
for the Ship
in the River
of Thames.

Plea in the
Admiralty.

Also that all and singular the Premises were and are true and notorious, as by a true Copy of the aforesaid Libel in the Court of the said Lady the Queen, before the Queen herself now here had, read and heard, amongst other Things more fully appears, when, in Truth, the Wares and Merchandizes, Works, and Labours aforesaid, were found, provided, done, sold, and delivered for the aforesaid Ship in the River of *Thames*, to wit, in the Parish of *St. Paul Shadwell* in the County of *Middlesex*, and not upon the High Sea, nor within the Jurisdiction of the Court of Admiralty aforesaid, as by the Libel aforesaid is above supposed; To all and singular which Matters the same *John Ballam* and *William Hart* unjustly constrained him the said *Nicholas Justin* to appear in the said Court of Admiralty, before the aforesaid Judge of the same Court, concerning the Premises, and to answer the same *John Ballam* and *William Hart* of and concerning the same; and although the same *Nicholas Justin* in the said Court of Admiralty, before the aforesaid Judge of that Court, did plead and alledge all and singular the Premises by him above suggested and alledged for his Discharge and Dismission from thence in this Behalf, and offered to prove the same by inevitable Testimony and Truth; yet the same Judge of that Court hath altogether refused and still refuses to admit the said Plea, Allegation and Proof: And the beforesaid *John Ballam* and *William Hart* do, with all their Power, endeavour and daily contrive to compel him the same *Nicholas Justin* to answer of and concerning the Premises aforesaid, and to be condemned in the Premises by the Sentence and final Decree of the Court of Admiralty aforesaid, in Contempt of the said Lady the now Queen, in Dishonour of her Crown and Dignity, and to the Damage, Impoverishment and manifest Grievance of the same *Nicholas*, and against the Law and Custom of the Realm of the said Lady the now Queen of *England*, and also against the Form and Effect of the several Statutes aforesaid in such Case in Form aforesaid made and provided: And this the same *Nicholas Justin* ready to verify: Wherefore the same *Nicholas*, humbly imploring the Aid and Bounty of the Court of the said Lady the Queen, before the now Queen herself, prays for himself a Remedy, and

Writ of Prohibition of the said Lady the Queen here, to be directed to the said Judge of the Court of Admiralty aforesaid, or to any other competent Judge whatsoever in this Behalf, to prohibit him or them that he or they hold not Plea in any Manner touching or concerning the Premises aforesaid, before him or them, &c. And it is granted to him, &c.

Pleas before the Lord the King at Westminster, of the Term of Easter in the Twelfth Year of the Reign of William the Third, now King of England, &c. Roll 108.

Hillyard against Cox.

Berkshire, to wit, **BE** it remembered, That heretofore, to wit, Salk. 37.

in the Term of *St. Michael* last past, before our Lord the King at *Westminster* came *Daniel Hillyard* Clerk, Administrator of all and singular the Goods and Chattels, Rights and Credits which were of *John Cox* deceased, at the Time of his Decease, who died Intestate, by *Edward Chapman* his Attorney, and brought into the Court of the said Lord the King then there his certain Bill against *Thomas Cox* in the Custody of the Marshal, &c. of a Plea of Trespass upon the Case; and there are Pledges of Prosecuting, namely, *John Doe* and *Richard Roe*, which said Bill is in these Words, that is to say, *Berkshire*, to wit, *Daniel Hillyard* Clerk, Administrator of all and singular the Goods and Chattels, Rights and Credits which were of *John Cox* deceased, at the Time of his Death, who died Intestate, complains of *Thomas Cox* in the Custody of the Marshal of the *Marshalsea* of the Lord the King, before the King himself being, for that, to wit, That whereas the aforesaid *Thomas*, on the first Day of *March* in the eleventh Year of the Reign of our Lord *William the Third*, now King of *England*, &c. at *Farringdon* in the County aforesaid, was indebted to the aforesaid *John* in his Life-time, in One hundred Shillings of lawful Money of *England* for divers Goods, Wares and Merchandizes of the same *John* by the before said *John* in his Life-time to the said *Thomas*, at the special Instance and Request of the same *Thomas*, before that Time sold and delivered: And being so indebted the aforesaid

Indebitatus
Assumpsit by
an Administrator for
Goods sold
and delivered by the
Intestate.

Quantum
meruit.

Breach.

Letters of
Administra-
tion commit-
ted.

Request.

Thomas in Consideration thereof afterwards, to wit, the same Day, Year and Place abovesaid, undertook, and then and there faithfully promised the said *John* in his Life-time, that he the abovesaid *Thomas* would well and truly pay and satisfy the said One hundred Shillings to the said *John*, when he should be thereunto afterwards requested: And whereas also afterwards, to wit, on the second Day of *March* in the eleventh Year abovesaid, at *Farringdon* abovesaid, in Consideration that the said *John* in his Life-time, at the like Instance and Request of the same *Thomas*, had sold and delivered to the same *Thomas* divers other Goods, Wares and Merchandizes of him the said *John*, the said *Thomas* took upon himself and then and there faithfully promised the same *John*, that he the abovesaid *Thomas* would well and truly pay and satisfy to the said *John* so much Money for the Goods, Wares and Merchandizes abovesaid last mentioned, as those Goods, Wares and Merchandizes at the Time of the Selling and Delivering thereof were reasonably worth, when he should be afterwards thereunto requested: And the said *Daniel* in Fact saith, that the Goods, Wares and Merchandizes abovesaid last mentioned at the Time of the Sale and Delivery thereof were reasonably worth another hundred Shillings of like lawful Money of *England*, to wit, at *Farringdon* abovesaid; and thereof the same *Thomas* then and there had Notice: Nevertheless the abovesaid *Thomas* his abovesaid Promises and Assumptions in Form abovesaid made not regarding, but contriving and fraudulently intending the same *John* in his Life-time, and the abovesaid *Daniel* after the Death of the said *John*, in his Behalf craftily and subtilly to deceive and defraud, hath not paid the several Sums of Money abovesaid to the said *John* in his Life-time, or the abovesaid *Daniel* after the Death of the said *John* (to which said *Daniel* Administration of all and singular the Goods and Chattels, Rights and Credits which were the abovesaid *John*'s at the Time of his Death, was in due Form committed by *Joseph Woodward*, Doctor of Laws and Archdeacon of the Archdeaconry of *Berks*, Official lawfully appointed, after the Death of the same *John*, to wit, on the tenth Day of *April* in the Year of our Lord One thousand six hundred ninety and nine, at *Farringdon* abovesaid, to which Official the Committing of the Administration abovesaid in this Behalf did of Right belong) nor hath any wise contented them, or either of them for the same; although to do this the abovesaid *Thomas*, after the Death of the said *John*, and after the Administration abovesaid in Form abovesaid committed, to wit, on the twentieth Day of *April* in the eleventh Year abovesaid, at *Farringdon* abovesaid by the abovesaid *Daniel* was requested, but hath altogether refused to pay or any wise satisfy the same unto the said *John* in his Life-time and the abovesaid *Daniel* after the Death of the said *John*, and still refuses to pay or satisfy the same to the said *Daniel*. Wherefore the said *Daniel* saith, that he is injured and hath Damage to the Value of ten Pounds: And therefore he brings Suit
Etc.

And the same *Daniel* brings here into Court the Letters of Administration afore said of the said *Joseph Woodward*, which testify the Commission of the Administration afore said in Form afore said, the Date whereof is on the Day and Year above said.

Protest of
the Letters
of Admini-
stration.

And now at this Day, to wit, *Wednesday* next after fifteen Days from the Day of *Easter* in this same Term, until which Day the afore said *Thomas Cox* had Leave to imparl to the afore said Bill, and then to answer, &c. before the Lord the King at *Westminster* comes as well the afore said *Daniel Hillyard* by his said Attorney, as the afore said *Thomas Cox* by *Edward Serle* his Attorney: And the same *Thomas* defends the Force and Injury, when, &c. and prays Oyer of the afore said Letters of Administration now here produced in Court, and in the Declaration afore said above specified; and they are read to him in these Words, to wit, *Joseph Woodward*, Doctor of Laws and Archdeacon of the Archdeaconry of *Berkshire*, Official lawfully constituted to our beloved in Christ *Daniel Hillyard* Clerk, principal Creditor of *John Cox*, when living, of *Newbery* within the County and Archdeaconry of *Berks* afore said, *Grocer*, lately deceased, Greeting in the Lord: Whereas the said *John Cox*, so as afore said deceased, lately died Intestate, We therefore desiring that the Goods, Rights and Credits of the said deceased be well and faithfully administred and converted, and disposed to be administred to pious Uses; Therefore for the well and faithfully disposing of the Goods, Rights and Credits of the afore said Deceased, and also for demanding, collecting, levying and requiring all Credits whatsoever of the said Deceased, and which belonged to the said Deceased whilst he lived, and at the Time of his Death, and for the Payment of what the said Deceased at such Time of his Death was indebted, as far as such Goods, Rights and Credits extend, according to the Value thereof; it is permitted you, in whose Fidelity we do in this Behalf confide, being sworn in due Form of Law upon GOD's Holy Evangelists, well and faithfully to administer the same, and to make a full and faithful Inventory of all and singular the Goods, Rights and Credits of the said Deceased; and to exhibit the same into the Registry of the said Archdeacon of *Berks* afore said, on or before the first Day of the Month of *June* next ensuing, and also to render thereof a full and true Account, Calculation or Estimation of and concerning your Addition on or before the first Day of *March*, which shall be in the Year of our Lord One thousand six hundred ninety and nine: By the Tenor of these Presents we commit full Power, and ordain, depute and constitute you by these Presents, Administrator of all and singular the Goods, Rights and Credits of the said deceased *Anne Cox*, Widow and Relict of the same Deceased, having first renounced in Writing the Administration of the Goods, &c. Dated at *Oxford* under the Seal of our Office, on the afore said tenth Day of *April* in the Year of our Lord One thousand six hundred ninety and nine.

Prays Oyer
of the Letters
of Admini-
stration.

Which

Pleads that
the Intestate
at the Time
of his Death
lived in an-
other Dio-
cese.

Which being read and heard, the same *Thomas* saith, that the
aforesaid *Daniel* his said Action thereupon against him ought not
to have or maintain, because he saith that the aforesaid *Thomas*
at the Time of the Death of the said *John Cox* and at the Time of
the committing the Administration aforesaid, and long before, was
an Inhabitant and Resident in the City of *Oxford* in the County of
Oxford, which said City is and always was within the Diocese of
Oxford, and out of the Archdeaconry of *Berkshire* aforesaid, and
the Jurisdiction of the Archdeacon of that Archdeaconry, which
said Archdeaconry and the whole County of *Berkshire* aforesaid
are and always were within the Diocese of *Salisbury*, and not with-
in the Diocese of *Oxford*; by which the Committing of Administra-
tion of all and singular the Goods and Chattels, Rights and Cre-
dits, which were the said *John Cox's* at the Time of his Death, or
Right belonged to *Thomas* by Divine Providence then and still
Archbishop of *Canterbury*, by reason of his Prerogative, and not to
the aforesaid Archdeacon of the Archdeaconry of *Berks*, or any
other inferior Judge; and the said Letters of Administration produ-
ced here in Court are void and of no Effect in Law: And this he is
ready to verify: Wherefore he prays Judgment if the aforesaid
Daniel ought to have or maintain his said Action thereupon against
him, &c.

Demurrer
with special
Causes.

And the aforesaid *Daniel Hillyard* saith, that he, notwithstand-
ing any Matters by the aforesaid *Thomas Cox* above in Pleading
alleged, ought not to be precluded from having his said Action
thereupon against the same *Thomas*, because he saith that the Plea
aforesaid by him the same *Thomas*, in Manner and Form aforesaid
above pleaded, and the Matter in the same contained, are not suffi-
cient in Law to preclude him the said *Daniel* from having his said
Action thereupon against the said *Thomas*. To which said Plea in
Manner and Form aforesaid above pleaded, he the same *Daniel*
need not, nor is bound by the Law of the Land in any Manner to
answer: And this he is ready to verify: Wherefore for Want of
sufficient Plea in this Behalf, the same *Daniel* prays Judgment, and
his Damages by Occasion of the Premises to be to him adjudged
&c. And for Causes of Demurrer in Law, according to the Force
of the Statute in such Case made and provided, the said *Daniel*
shews and demonstrates to the Court here these Causes following
to wit, for that it doth not appear by the Plea aforesaid, that the
aforesaid *Thomas Cox* was not an Inhabitant within the Diocese of
the Bishop of *Salisbury* at the Time of the Death of the aforesaid
John Cox; and that the said Plea is uncertain and wants Form
&c.

Joinder.

And the aforesaid *Thomas Cox* saith, that the Plea aforesaid
by him the said *Thomas* in Manner and Form aforesaid above plea-
ded, and the Matter in the same contained, are good and sufficient
in Law to preclude him the said *Daniel* from having his said Ac-
tion thereupon against him the said *Thomas*, which said Plea

the Matter in the same contained the same *Thomas* is ready to verify and prove as the Court, &c. And because the said *Daniel* hath not answered to that Plea, nor hath hitherto in any wise contradicted it, the said *Thomas*, as before, prays Judgment, and that the aforesaid *Daniel* be precluded from having his Action aforesaid thereupon against the said *Thomas*, &c. But because the Court of the said Lord the King now here are not yet determined of giving their Judgment of and upon the Premises, a Day is therefore given to the Parties aforesaid before the Lord the King at *Westminster*, until — Day next after — of hearing their Judgment thereon, for that the Court of the said Lord the King now here thereof not yet, &c.

Pleas before the Lord the King at Westminster, of the Term of the Holy Trinity in the Twelfth Year of the Reign of our Lord William the Third, now King of England, &c. Roll 369.

Gidley against Williams.

Cornwall, to wit, **B**E it remembered, That heretofore, to wit, Salk. 37. Cases B. R. 443. in the Term of *Easter* last past, before the Lord the King at *Westminster* came *Thomasin* *Gidley* Widow, Administratrix of all the Goods and Chattels of *Richard* her Husband lately deceased, by *Peter* *Champion* her Attorney, and brought into the Court of the said Lord the King then there her certain Bill against *Petherick* *Williams*, otherwise called *Petherick* *Booth*, of the Parish of *Withiel* in the County of *Cornwall*, Yeoman, in the Custody of the Marshal, &c. of a Plea of Debt; and there are Pledges of Prosecuting, namely, *John* *Doe* and *Richard* *Roe*; which said Bill followeth in these Words, that is to say, *Cornwall*, to wit, *Thomasin* *Gidley*, Widow and Administratrix of all the Goods and Chattels of *Richard* *Gidley* her Husband lately deceased, complains of *Petherick* *Williams*, otherwise called *Petherick* *Booth*, of the Parish of *Withiel* in the County of *Cornwall*, Yeoman, in the Custody of the Marshal of the *Marshalsea* of our Lord the King, before the King himself being, of a Plea, that he pay to her twenty Pounds of lawful Money of *England*, which he oweth to her, and unjustly detains, for that, to wit, That

Declaration by an Administratrix upon a Bill obligatory to the Intestate.

N. B. Defendant not having demurred, the bringing this Action in the Debt and Detinet is cured by the Verdict.
1 Sid. 342,
379.
Show. 57.

The granting Letters of Administration ought to have been inserted here.

Impar lance.

It is not his Deed pleaded.

Venire awarded.

whereas the aforesaid *Petherick*, on the tenth Day of *June* in the Year One thousand six hundred and eighty-five, at *Great Sr. Collombe* in the County aforesaid, by his certain Bill obligatory, sealed with the Seal of him the said *Petherick*, and shewn to the Court of the said Lord the King now here, the Date of which is the same Day and Year, acknowledgeth himself to owe and be indebted to the same *Richard Gidley* in his Life-time, in the intire Sum of ten Pounds of good and lawful Money of *England*, to be paid to the same *Richard* in his Life-time, his Executors, Administrators or Assigns, at or upon the tenth Day of *December* next following the Date of the aforesaid Bill obligatory, and for the true Payment thereof bound himself, his Executors and Administrators in the full Sum of twenty Pounds of lawful *English* Money; and the said *Thomasin* in Fact saith, that the aforesaid *Petherick* did not pay to the same *Richard* in his Life-time the aforesaid Sum of ten Pounds, at or upon the tenth Day of *December* next following the Date of the Bill obligatory aforesaid, which he ought to have paid to the said *Richard* upon the same Day, according to the Form and Effect of the Bill obligatory aforesaid: Whereby an Action hath accrued to the same *Richard* in his Life-time, and to the said *Thomasin* after the Death of the said *Richard*, to require and have of the aforesaid *Petherick* the aforesaid Sum of twenty Pounds: Nevertheless the aforesaid *Petherick*, although often requested, &c. hath hitherto altogether refused to pay the aforesaid twenty Pounds to the said *Richard* in his Life-time, or to the same *Thomasin* after the Death of the said *Richard*, and still refuseth to pay the same to the said *Thomasin*, to the Damage of the said *Thomasin* of twenty and five Pounds: And therefore she brings Suit, &c. And the aforesaid *Thomasin* brings here into Court the aforesaid Letters of Administration of the aforesaid *Richard*, whereby it sufficiently appears to the Court here, that the aforesaid *Thomasin* is the Administratrix of the aforesaid *Richard*, and thereupon hath Administration, &c.

And now at this Day, to wit, *Friday* next after the Morrow of the *Holy Trinity* in this same Term, to which Day the aforesaid *Petherick* had Leave to imparl to the said Bill, and then to answer, &c. before the Lord the King at *Westminster* comes as well the aforesaid *Thomasin* by her said Attorney; and the same *Petherick*, by *Joseph Hawkey* his Attorney; and the same *Petherick* defends the Force and Injury, when, &c. and saith that he ought not to be charged with the Debt aforesaid by Virtue of the said Bill obligatory, because he saith that the aforesaid Bill is not his Deed: And of this he puts himself upon the Country; and the aforesaid *Thomasin* in like Manner, &c.

Therefore let a Jury come thereupon before the Lord the King at *Westminster*, on *Wednesday* next after three Weeks from the Day of the *Holy Trinity*; and who neither, &c. to recognize, &c. because as well, &c. The same Day is given to the Parties aforesaid there,

there, &c. Afterwards the Proceedings are thence continued between the aforesaid Parties of the Plea aforesaid, by the Jury respited thereupon between them, before the Lord the King at *Westminster*, until *Wednesday* next after three Weeks from the Day of the *Holy Trinity* then next following, unless the Justices of the Lord the King appointed to take the Assizes in the County aforesaid first come on the ninth Day of *August* at *Launceston* in the County aforesaid, by Form of the Statute, &c. for Default of Jurors, &c. At which Day before the Lord the King at *Westminster* comes the aforesaid *Thomasin* by her said Attorney: And the before-said Justices of the Lord the King, before whom, &c. sent here their Record had before them in these Words: Afterwards, at the Day and Place within mentioned, before Sir *John Powell*, Knt. one of the Justices of our Lord the King of the Bench of Justices of our said Lord the King appointed to take the Assizes in the County of *Cornwall*, and *Francis Swanton*, Esq; Associate to the same *John Powell*, for this Turn, by the Form of the Statute, &c. came the within named *Thomasin Gidley*, Widow, by her Attorney within mention'd; and the within named *Petherick Williams*, although solemnly required, did not come, but made Default: Therefore let the Jury whereof Mention is within made be taken against him by Default: And the Jurors of that Jury being summoned came, who being elected, tried and sworn to speak the Truth of the within Contents, upon their Oath say, that the Bill obligatory within mentioned is the Deed of the aforesaid *Petherick Williams*, as the aforesaid *Thomasin* hath within against him declared, and assess the Damages of the said *Thomasin*, by Occasion of the Detention of the within written Debt, over and above her Costs and Charges by her about her Suit in this Behalf applied, to Two-pence, and for those Costs and Charges to forty Shillings: Therefore it is considered, That the aforesaid *Thomasin* do recover against the aforesaid *Petherick* her said Debt and the Damages aforesaid by the Jury in Form aforesaid assessed; and also thirteen Pounds and ten Shillings for her Costs and Charges by the Court of the said Lord the King now here adjudged to the said *Thomasin*, by her Assent, of Increase: Which said Damages in the Whole amount to fifteen Pounds ten Shillings and Two-pence; and that the said *Petherick* be taken, &c.

Postea continued.

Return of the Postea.

Default.

Verdict for the Plaintiff.

Pleas

Pleas before our Lady the Queen at Westminster, of the Term of the Holy Trinity in the Third Year of the Reign of the Lady Anne, now Queen of England, &c. Roll 90.

Slater against May.

3 D. 351. p 4
6 Mod. 304.
3 Salk. 23.
Salk. 42.

Declaration
by an Admin-
istrator du-
ring the Ab-
sence of the
Executor,
for Money
lent by the
Intestate.

Indebitat.
Assumpsit.

London, to wit, **B**E it remembered, That heretofore, to wit, in the Term of *Easter* last past, before the Lady the Queen at *Westminster* came *John Slater*, Administrator of all and singular the Goods, Rights and Credits which were *Christopher Toulden's* deceased at the Time of his Death, by *Thomas Moore* his Attorney, and brought into the Court of the said Lady the Queen then there his certain Bill against *John May* in the Custody of the Marshal, &c. of a Plea of Trespass upon the Case; and there are Pledges of Prosecuting, namely, *John Doe* and *Richard Roe*, which said Bill followeth in these Words, that is to say, *London, to wit, John Slater*, Administrator of all and singular the Goods, Rights and Credits which were *Christopher Toulden's* deceased at the Time of his Death, complains of *John May* in the Custody of the Marshal of the *Marshalsea* of the Lady the Queen, before the Queen herself being, for that, to wit, That whereas the aforesaid *John May*, on the twenty-third Day of *January* in the Year of our Lord One thousand six hundred ninety and nine at *London, to wit, in the Parish of St. Mary le Bow* in the Ward of *Cheap*, was indebted to the said *Christopher* in his Life-time in thirty Pounds of lawful Money of *England*, for so much Money of the same *Christopher* in his Life-time, by him the said *Christopher* in his Life-time to the said *John May*, at the special Instance and Request of him the said *John May*, before that Time lent and accommodated; and being so thereupon indebted he the said *John May* in Consideration thereof, afterwards, to wit, the same Day and Year aforesaid, at *London* aforesaid in the Parish and Ward aforesaid, took upon himself and then and there faithfully promised the said *Christopher* in his Life-time, that he the said *John May* would well and faithfully satisfy and pay the aforesaid thirty Pounds to the same *Christopher*, when afterwards he should be thereunto requested: And whereas also the aforesaid *John May* afterwards, to wit, the same Day and Year aforesaid, at *London* aforesaid in the Parish and Ward aforesaid was indebted to the said *Christopher* in his Life-time in other thirty Pounds of like lawful Money of *England*, for so much Money

of him the said *Christopher* in his Life-time, by the said *John May* for the same *Christopher*, and to the Use of him the said *Christopher*, before that Time had and received; and being so indebted, the aforesaid *John May* afterwards, to wit, the same Day and Year aforesaid at *London* aforesaid, in the Parish and Ward aforesaid, in Consideration thereof, took upon himself and then and there faithfully promised the same *Christopher* in his Life-time, that he the said *John May* would well and truly pay and satisfy the said thirty Pounds last mentioned to the said *Christopher*, when he should be thereunto afterwards requested: Nevertheless the said *John May*, his several Promises and Undertakings aforesaid in Form aforesaid made not regarding, but contriving and fraudulently intending in this Behalf craftily and subtilly to deceive and defraud the said *Christopher* in his Life-time, and the said *John Slater* after the Death of the said *Christopher*, of the said several Sums of Money (to which said *John Slater* Administration of all and singular the Goods, Rights and Credits which were the aforesaid *Christopher* *Toulden's* at the Time of his Death, with his Will annexed, for the Use and Benefit and during the Absence of *Elizabeth Vittery*, the Executrix named in the said Will, by *Thomas* by Divine Providence Archbishop of *Canterbury*, Primate and Metropolitan of all *England*, on the fifteenth Day of *October* in the Year of our Lord One thousand seven hundred and three, at *London* aforesaid in the Parish and Ward aforesaid were in due Form of Law committed) hath not paid the said several Sums of Money, or any Part thereof, to the said *Christopher* in his Life-time, or to the said *John Slater* after the Death of him the said *Christopher*, nor hath hitherto in any Manner contented them for the same (although to do this the aforesaid *John May* by the said *Christopher* in his Life-time, and by the said *John Slater* after the Death of the said *Christopher*, and the Committing of the Administration aforesaid at *London* aforesaid, in the Parish and Ward aforesaid was requested); but altogether refused to pay or in any Manner to satisfy the same unto the said *Christopher* in his Life-time, and yet refuseth to pay them to the said *John Slater*, to the Damage of him the said *John Slater* of forty Pounds: And thereupon he brings Suit, &c. And the said *John Slater* brings here into Court the said Letters of Administration aforesaid of the said Archbishop, which testify the Commission of the Administration aforesaid to the said *John Slater* in Form aforesaid, the Date whereof is the same Day and Year in that Behalf above-mentioned, &c.

Another Indebitat. Assump. for Money had and received to the Intestate's Use.

Breach.

Letters of Administration set forth.

Request.

And now at this Day, to wit, *Friday* next after the Morrow of the *Holy Trinity* in this same Term, until which Day the said *John May* had Leave to imparl to the aforesaid Bill, and then to answer, &c. before the Lady the Queen at *Westminster* comes as well the said *John Slater* by his said Attorney, as the said *John May* by *Richard Gates* his Attorney: And the same *John May* defends the Force and Injury, when, &c. and saith that the Declaration

Demurrer to
the Declara-
tion.

Joinder.

claration aforesaid, and the Matter therein contained, are not sufficient in the Law for the said *John Slater* to have and maintain his said Action thereupon against him the said *John May*; and that he hath no need, nor is bound by the Law of the Land in any Manner to answer the said Declaration in Manner aforesaid declared: And this he is ready to verify: Wherefore for Defect of a sufficient Declaration in this Behalf, the said *John May* prays Judgment, if the said *John Slater* ought to have his said Action against him the said *John May*, &c. And for Causes of Demurrer in Law in this Behalf, the same *John May*, according to the Form of the Statute in such Case lately made and provided, sheweth and pointeth out to the Court here these Causes following, to wit, That the Declaration aforesaid is altogether uncertain, double insensible, insufficient in Law, and Wants Form, &c. And the aforesaid *John Slater* saith, that notwithstanding any Thing by the said *John May* above alledged, the Declaration aforesaid of the said *John Slater* ought not to be quashed, because he saith that the Declaration aforesaid, and the Matter in the same contained, are good and sufficient in the Law for him the said *John Slater* to have and maintain his said Action thereon against him the said *John May*: Which said Declaration and the Matter in the same contained the said *John Slater* is ready to verify and prove as the Court, &c. And because the aforesaid *John May* hath not answered to that Declaration, nor hath hitherto any ways contradicted it, the said *John Slater* prays Judgment and his Damages by Occasion of the Premises to him to be adjudged, &c. But because the Court of our said Lady the Queen now here are not yet determined of giving their Judgment of and concerning the Premises aforesaid, a Day therefore is given to the aforesaid Parties before the Lady the Queen at *Westminster*, until — Day next after — of hearing their Judgment of and concerning the said Premises, for that the Court of the said Lady the Queen here thereof not yet, &c.

Pleas before the Lord the King at Westminster, of the Term of St. Michael in the Eleventh Year of the Reign of the Lord William the Third, now King of England, &c. Roll 377.

The Bishop of Salisbury against Phillips.

THE Lord the King hath given in Charge to his beloved and faithful Sir George Treby, Knt. his Chief Justice of the Bench, his Writ closed in these Words, to wit, *William the Third*, by the Grace of GOD, of *England, Scotland, France and Ireland* King, Defender of the Faith, &c. To his beloved and faithful Sir George Treby, Knt. his Chief Justice of the Bench, Greeting: Because in the Record and Proceedings, and also in the giving of the Judgment of the Complaint which was in our Court before you and your Brethren our Justices of the Bench aforesaid, by our Writ between *William Phillips*, Executor of the Will of *William Phillips*, Gentleman, his Father lately deceased, and *Gilbert*, Bishop of *Salisbury* and *John Berrow*, Clerk, to the End that the same Bishop and *John* should permit him the said *William Phillips*, the now Plaintiff, to present a fit Person to the Church of *Stanton*, otherwise *Stanton Fitz-Warren*, otherwise *Stanton Fitz-Herbert*, in the County of *Wilts*, which was vacant, and did belong to his Gift, as it was said, manifest Error intervened, to the great Damage of them the said Bishop and *John*, as we have been informed from his Complaint, We being willing that the Error (if any was) should be in due Manner corrected, and that full and speedy Justice should be done to them the said Bishop and *John*, in this Behalf, do command you, that if Judgment be thereupon given, then that you distinctly and plainly send the Record and Proceedings aforesaid, with all Things to them belonging, unto us under your Seal, and this Writ; so that we may have them from the Day of *Easter* in five Weeks wheresoever we shall then be in *England*, that we having inspected the Record and Proceedings aforesaid, may cause to be done that which of Right and according to the Law and Custom of our Kingdom of *England* is most fit to be done further thereupon for correcting that Error. Witness Our self at *Westminster* the twenty-sixth Day of *April* in the eleventh Year of our Reign.

Salk. 43.
Carth. 505.
Holt 52.
S. C.

Writ of Error.

Hale:

The

The Answer of Sir *Geo. Treby*, Knt. Chief Justice within named.
 The Record and Proceedings of the Complaint whereof Mention is within made, with all Things concerning the same, before the Lord the King, wheresoever, &c. at the Day within mentioned, I send in a certain Record to this Writ annexed, as within I am commanded.

Geo. Treby.

Pleas inrolled at *Westminster* before Sir *George Treby* Knt. and his Brethren, Justices of our Lord the King, of the Bench, of the Term of the *Holy Trinity* in the Tenth Year of the Reign of our Lord *William* the Third, by the Grace of God, of *England, Scotland, France and Ireland* King, Defender of the Faith, &c. Roll 1562.

Quare Impedit by the Executor of Will. Phillips.

Declares upon an Agreement by Indenture between Jointenants to present by Turns.

Profert of the Indenture.

Wilts, to wit, *Gilbert*, Bishop of *Salisbury*, and *John Berrow*, Clerk, were summoned to answer *William Phillips*, Gent. Executor of the Last Will and Testament of *William Phillips*, Gent. his Father lately deceased, of a Plea, that they permit him the said *William Phillips*, now Plaintiff, to present a fit Person to the Church of *Stanton*, otherwise *Stanton Fitz-Warren*, otherwise *Stanton Fitz-Herbert*, which is vacant [or void] and belongs to his Gift, &c. And whereupon the same *William Phillips*, now Plaintiff, by *Dennis Russell* his Attorney saith, That whereas one *Richard Organ* and one *John Organ* were seised as of Fee and Right of the Advowson of the aforesaid Church in *Gross*, and being thereof so seised, the aforesaid *Richard Organ* and *John Organ* on the twenty-sixth Day of *June* in the thirteenth Year of the Reign of *James* the First, late King of *England*, at *Stanton* aforesaid in the County aforesaid, by their certain Indenture made between the said *Richard Organ*, by the Name of *Richard Organ* of *Lamborn* in the County of *Berks*, Gent. of the one Part, and the said *John Organ* by the Name of *John Organ* of *Stanton* within the Hundred of *Highworth* in the County of *Wilts*, Gent. of the other Part, the other Part whereof, sealed with the Seal of the said *John Organ*, the same *William Phillips* now Plaintiff brings here into Court, the Date whereof is on the same Day and Year concluded and agreed between themselves, that they the said *Richard Organ* and *John Organ* should be thereupon seised in Common, not jointly, of the Advowson of the Church aforesaid, that is to say, that the said *Richard Organ* should stand and be seised, and have, hold and enjoy one Moiety of the said Advowson to him and his Heirs, and that the said *John Organ* should stand and be seised, and have, hold and enjoy the other Moiety of the said Advowson to him and his Heirs; and that the said *Richard Organ* and *John Organ* and their several Heirs, so often as the said Church of *Stanton* should become vacant [or void] severally and respectively should present by several Turns one after another in Manner and Form following to wit, that the said *Richard Organ* and his Heirs might present to the said Church at the first Turn when the said Church should happen

happen first and next to be vacant [or void] for it; And that the said *John Organ* and his Heirs might present to the said Church when the same should then next be vacant [or void] the second Time; and so the said *Richard Organ* and *John Organ* severally and their several and respective Heirs, in their several Turns alternately, as the same Church at any Time thereafter should become vacant [or void] should or might present their Clerks according to the Order and Course concluded and agreed upon as before is mentioned, as by the same Indenture amongst other Things more fully appears; whereby the same *Richard* and *John* were seised of the Advowson aforesaid to be presented to the same Church in Form aforesaid; And being so seised thereof, the said *Richard Organ*, after the making of the said Indenture, beginning his first Turn, and as in his first Turn at *Stanton* aforesaid, presented to the said Church being Vacant one *John Woodbridge* his Clerk, who at the Presentation of the same *Richard Organ* was there admitted and instituted in the same, in Time of Peace, in the Time of our Lord *James* the First, late King of *England*. And afterwards the Church aforesaid became Vacant by the Death of the said *John Woodbridge* there, whereby the said *John* presented to the same Church so vacant (or void) as in the second Turn, at *Stanton* aforesaid, *Thomas Hotchkis* his Clerk, who at the Presentation of him the said *John Organ* was admitted and instituted in the same, in Time of Peace, in the Time of our Lord *Charles* the First, late King of *England*; and the aforesaid *Richard Organ* and *John Organ* being so seised of the Advowson aforesaid, the said *Richard Organ* afterwards at *Stanton* aforesaid died seised of such his Estate, by and after whose Death a Moiety of the Advowson aforesaid descended to one *John Organ* as Brother and Heir of the said *Richard Organ*, whereby the same *John Organ* the Brother was seised of the Moiety of the Advowson aforesaid as of Fee and Right to present in Form aforesaid; And being so seised thereof afterwards, to wit, on the twenty fifth Day of *August* in the fourteenth Year of the Reign of the said late King *Charles* the First, by a certain Indenture made between him the said *John Organ* of the one Part, and one *Richard Hippesley* of *Stone Easton* in the County of *Somerset* Gentleman, Nephew of the said *John Organ* the Brother, to wit, second Son of *Elizabeth Hippesley* Widow, natural Sister of the said *John Organ*, the Brother, of the other Part, made at *Stanton* aforesaid in the County aforesaid, the other Part whereof, sealed with the Seal of the said *John Organ* the Brother, the same *William Phillips* the now Plaintiff produces here in Court, the Date whereof is the same Day and Year last abovesaid, and in Consideration of the natural Love and Affection which he had and bore towards the said *Richard Hippesley*, and in Consideration of the Blood between them, and for the better Preferment, Advancement, Maintenance, and Livelihood of the said *Richard Hippesley* and his Brother, in the same Indenture afterwards named, he the said *John Organ*, the

First Presentation.

Vacancy by Death. Second Presentation.

Descent of one Moiety.

Another Agreement by Indenture.

Consideration.

Settled in
Tail to the
Uses decla-
red.

Grant of the
next Avoi-
dance to the
Testator and
Fr. Symes
their Execu-
tors and As-
signs.

Brother, for himself and his Heirs, covenanted, granted and agreed to and with the said *Richard Hippesley* and his Heirs, that he the said *John Organ*, the Brother, his Heirs and Assigns, and every of them, and all and every other Person and Persons and their Heirs, who then were or thereafter should stand and be seised of and in the said Moiety of the Advowson aforesaid, should stand and be seised of the same, to the Use and Behoof of the said *Richard Hippesley*, and the Heirs of the Body of the said *Richard Hippesley* lawfully to be begotten; and for Want of such Issue, to the Use and Behoof of *Robert Hippesley*, Brother of the said *Richard Hippesley*, and the Heirs of the Body of the said *Robert Hippesley* lawfully to be begotten; and for Default of such Issue, to the Use and Behoof of the said *John Organ*, the Brother, and his Heirs and Assigns for ever; and to no other Uses, Intents, or Purposes whatsoever, as by the said Indenture last mentioned more fully appears; by Virtue of which said Indenture, and by Force of a certain Act, made and provided in the Parliament of our Lord *Henry* the Eighth late King of *England*, held at *Westminster* in the County of *Middlesex* on the fourth Day of *February* in the twenty seventh Year of his Reign, of transferring Uses into Possession, the aforesaid *Richard Hippesley* was seised of a Moiety of the Advowson aforesaid, as of Fee Tail and Right belonging to the Remainder thereof in Form aforesaid, to wit, to present in Form aforesaid; And the said *Richard Hippesley* being so seised thereof afterwards at *Stanton* aforesaid in the County aforesaid died, by and after whose Death the said Moiety of the Advowson aforesaid descended to *Richard Hippesley Esq*; as Son and Heir of the Body of the said *Richard Hippesley*, whereby the same *Richard Hippesley* the Son was seised of the said Moiety of the Advowson aforesaid as of Fee Tail and Right; And the same *Richard Hippesley* the Son being so seised thereof afterwards, at *Stanton* aforesaid, died without Issue of his Body, by and after whose Death the said Moiety of the Advowson aforesaid descended to *John Hippesley Esq*; as Son and Heir of the Body of the said *Richard Hippesley* first named, whereby the said *John Hippesley* was seised of the said Moiety of the Advowson aforesaid as of Fee and Right. And the said *John Hippesley* being so thereof seised afterwards, to wit, the sixteenth Day of *January* in the twenty fourth Year of the Reign of our Lord *Charles* the Second, late King of *England*, at *Stanton* aforesaid in the County aforesaid, by his certain Writing, which the same *William Phillips* the now Plaintiff produces here in Court, sealed with the Seal of the said *John Hippesley*, the Date of which is the same Day and Year, did give and grant to *Francis Symes* the Elder of *Kelmescot* in the County of *Oxford* Gentleman, and *William Phillips* the Testator of *Eaton Hastings* in the County of *Berks* Gentleman, his Executors and Assigns, the first and next Advowson, Donation, Nomination, Presentation, and free Disposition of the said Parish Church of *Stanton*, otherwise called *Stanton*

Fitzherbert, otherwise *Stanton Fitzwarren*, willing and by his same Writing granting that it should and might be lawful to and for the said *Francis Symes* and *William Phillips*, the Testator, their Executors and Assignees, to present to the said Church of *Stanton Fitzherbert*, otherwise *Stanton Fitzwarren*, whensoever or howsoever by Death, Resignation, Deprivation, Cession, Permutation, Dismission, or any other Way whatsoever, by which the same Church should happen then first and next to be vacant [or void] any Honest and Learned Clerk for the then next Turn only, as by the Writing aforesaid more fully appears; by Virtue of which Grant the same *Francis Symes* and *William Phillips*, the Testator, were possessed of the Advowson of the Church of *Stanton* aforesaid; that is to say, to present to the same Church, when first and next it should happen to be vacant; and being so possessed thereof, the said *Francis Symes* afterwards at *Stanton* aforesaid in the County aforesaid died, and the said *William Phillips* the Testator survived, and then was to be possessed of the Advowson aforesaid by Right of *Survivorship*, &c. And the said *William Phillips* the Testator, being so thereof possessed, the said Church in the Life-time of the said *William Phillips*, the Testator, was vacant [or void] by the Death of the said *Thomas Hotchkis*, and still remains vacant [or void]; which said Vacancy [or Avoidance] of the Church aforesaid by the Death of the aforesaid *Thomas Hotchkis*, is the first and next Vacancy [or Avoidance] of the said Church after the aforesaid Grant to the same *Francis Symes* and *William Phillips* by the said *John Hippsley* in Form aforesaid made, and for that Reason it belonged to the said *William Phillips* the Testator in his Life-time, to present a fit Person to the Church aforesaid so vacant [or void]; and the said Bishop and *John Berrow* have unjustly hindered him the said *William Phillips* the Testator; and the said *William Phillips* the Testator, the said Church being so vacant [or void] as aforesaid, afterwards, to wit, on the twenty first Day of *June* in the sixth Year of the Reign of our said Lord the now King, and of the Lady *Mary* late Queen of *England*, &c. at *Stanton* aforesaid in the County aforesaid made his Last Will and Testament, and by the same did constitute and ordain the said *William Phillips*, the now Plaintiff, Executor of his said Will, and afterwards there died; after the Death of which said *William Phillips*, the Testator, the said *William Phillips* the now Plaintiff took upon himself the Burthen and Execution of the said Will, and that Will hath proved in due Form of Law, to wit, at *Stanton* aforesaid, and for that Reason at present belongs to him the said *William Phillips* the now Plaintiff, to present a fit Person to the said Church so vacant [or void]: And the said Bishop and *John Berrow* do unjustly hinder him the said *William Phillips* the now Plaintiff; wherefore the same *William Phillips*, the now Plaintiff, saith that he is injured and has Damage to the Value of six hundred Pounds: And therefore he brings this Bill, &c. With this, that the said *William Phillips* the now Plaintiff

Francis Symes
one of the
Grantees
dies and the
Plaintiff's
Testator sur-
vives.

The Vacancy
in the Testa-
tor's Life.

Testator
made his
Will, and
the Plaintiff
his Execu-
tor.

Will proved.

tiff

Avers the
Life of the
Grantor and
the Identity
of the
Church.

Plea Parson
Imparsonnee.

Admit the
Vacancy,
and thereafter
six Months
the Bishop
presented by
Laple.

Replies and
admits the
Time of the
Vacancy.

But says that
within the
six Months,
to wit, 16 of
Oct. 1693,
the Testator
by Writing
presented J.
Syms, and
requested
the Bishop to
admit him,
who refused.

tiff will verify that the said *John Hippesley* is still living and in full Life, to wit, at *Stanton* aforesaid in the County aforesaid. And that the Church of *Stanton*, otherwise *Stanton Fitz-Warren*, otherwise *Stanton Fitz-Herbert*, is one and the same Church and not another nor different: And he brings here into Court the Letters testamentary of the said *William Phillips* the Testator, by which it sufficiently appears to the Court here, that he the said *William Phillips* the now Plaintiff is Executor of the said Will, and has Administration thereof, &c.

And the said *Gilbert* Bishop of *Salisbury*, and *John Berrow* Clerk by *John Carpenter* their Attorney, come and defend the Force and Injury when, &c. And the said *John Berrow* saith that he is Parson *imparsonnee* of the Church aforesaid by the Collation of the said Bishop; And the said Bishop and *John Berrow* further say That the said *William Phillips* the Executor ought not to have his said Action against them; because they say, That the said Church of *Stanton*, otherwise *Stanton Fitz-Warren*, otherwise *Stanton Fitzherbert*, was vacant [or void] by the Death of the said *Thomas Hotchkis* on the twentieth Day of *September* in the Year of our Lord one thousand six hundred ninety and three, and remained so vacant until the twenty third Day of *April* in the Year of our Lord one thousand six hundred ninety and four, on which Day at *Stanton* aforesaid the said Bishop, because that at that Time six Months after the Vacancy [or Avoidance] of the same Church were fully elapsed and devolved, being the Ordinary of that Place, collated the said *John Berrow* Clerk to that Church then being vacant, as it was lawful for him: And this they are ready to verify: Wherefore they pray Judgment if the said *William* the Executor ought to have his said Action against them, &c. And the said *William Phillips* the Executor saith, that he, notwithstanding any Matters before alledged, ought not to be precluded from having his said Action, because he saith that well and true it is that the aforesaid Church of *Stanton*, otherwise *Stanton Fitzwarren*, otherwise *Stanton Fitzherbert*, by the Death of the said *Thomas Hotchkis* on the said twentieth Day of *September* in the Year of our Lord One thousand six hundred ninety three aforesaid was vacant [or void] as the said Bishop and *John Berrow* in pleading have alledged: But the same *William Phillips* the Executor further saith, that after the said twentieth Day of *September* in the Year of our Lord One thousand six hundred ninety and three aforesaid, and before the said twenty third Day of *April* in the Year of our Lord One thousand six hundred ninety and four, within six Months after the Death of the said *Thomas Hotchkis*, to wit, on the sixteenth Day of *October* in the Year of our Lord one thousand six hundred ninety and three, the said *William Phillips* the Testator by his Writing sealed with his Seal, the Date of which on the same sixteenth Day of *October* in the Year of our Lord One thousand six hundred ninety and three, at *Stanton* aforesaid

the County aforesaid, the said Bishop being then Ordinary of the said Place of *Stanton*, otherwise *Stanton Fitz-Warren*, otherwise *Stanton Fitz-Herbert*, presented one *John Symes*, Master of Arts, his Clerk; and then and there requested the said Bishop, to admit and institute the same *John Symes* to the Church aforesaid so vacant by the Death of the said *Thomas Hotchkis*, which said *John Symes* the said Bishop then and there altogether refused to admit and institute to the said Church, at the aforesaid Presentation of the said *William Phillips* the Testator, and hindered him the said *William Phillips* the Testator from Presenting: And this he is ready to verify: Wherefore he prays Judgment and Damages by Occasion of the Hinderance [or Impediment] aforesaid, and also a Writ to the said Bishop to him to be adjudged, &c.

And the said Bishop and *John Berrow* say, that well and true it is, that the said *William Phillips* the Testator, by his Writing sealed with his Seal, did present the said *John Symes*, as the same *William* the Executor hath above in his Replication alledged: But the said Bishop and *John Berrow* further say, That afterwards, and within six Months after the Avoidance [or Vacancy] of the said Church, to wit, on the said sixteenth Day of *October* in the Year of our Lord One thousand six hundred ninety and three aforesaid, the said *John Symes* at *Stanton* aforesaid brought the Presentation aforesaid to the said Bishop, and required the said Bishop to give the said *John Symes* a few Days to prepare himself to be examined concerning his Sufficiency in Learning to have the Church aforesaid; and that the said Bishop thereupon, upon the Request of the said *John Symes*, then and there did give Leave to the said *John Symes* to go away and there to return to the said Bishop within three Days next following, to be examined of his Sufficiency aforesaid, which said three Days were ended long before the End of six Months after the Vacancy [or Avoidance] of the Church aforesaid by the Death of the said *Thomas Hotchkis*, that is to say, by the Space of one Month, to wit, at *Stanton* aforesaid. And the said Bishop and *John Berrow* further say, that the same Bishop, for the said three Days afterwards, was there ready to examine the said *John Symes* concerning his Sufficiency aforesaid; and that the said *John Symes*, neither within the said three Days, nor ever afterwards, did not return nor offer himself to the said Bishop to be examined concerning his said Sufficiency; by which the said Church remained void [or vacant] for the Space of six Months and upwards after the aforesaid Vacancy or Avoidance by the Death of the said *Thomas Hotchkis*; whereupon the said Bishop collated the said *John Berrow* to the said Church so vacant [or void]; which said *John Berrow* was afterwards inducted into the same Church in due Form of Law, without this, that the said Bishop altogether refused to admit and institute the said *John Symes* to the Church aforesaid at the Presentation of the said *William Phillips* the Testator, as the said *William Phillips* the

Rejoin and admit the Presentation, but say, That J. Symes took it away, and desired Time to prepare himself for Examination, and never returned.

Traverses his Refusal to admit J. Symes.

Executor hath above alledged: And this they are ready to verify: Wherefore they pray Judgment, and that the said *William* the Executor from his said Action be precluded, &c.

Surrejoinder
and Issue up-
on the Tra-
verse.

And the said *William Phillips* the Executor, as before saith, That the said Bishop hath altogether refused to admit and institute the said *John Symes* to the Church aforesaid, at the Presentation of the said *William Phillips* the Testator, as the said *William Phillips* the Executor hath above in his Replication thereupon alledged: And they pray that this may be inquired of by the Country: And the said Bishop and *John Berrow* likewise, &c.

Continuances
by Non mis-
breve.

Therefore the Sheriff is commanded, That he cause to come here in three Weeks from the Day of the *Holy Trinity*, Twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. At which Day the Parties come here, &c. And the Sheriff hath not returned the Writ: Therefore, as before, the Sheriff is commanded, that he Cause to come here in three Weeks from the Day of *St. Michael*, Twelve, &c. to recognize in Form aforesaid, &c. At which Day the Parties come here, &c. and the Sheriff hath not returned the Writ: Therefore, as before, the Sheriff is commanded, that he cause to come here in eight Days from the Day of the Purification of the Blessed *Mary*, Twelve, &c. to recognize in Form aforesaid, &c. At which Day the Jury between the said Parties of the aforesaid Plea was respited thereon between them here until this Day, to wit, in fifteen Days from the Day of *Easter* then next following, Unless the Justices of our Lord the King appointed to take the Assizes in the County aforesaid, by the Form of the Statute, &c. first come on *Saturday* the eleventh Day of *March* past, at *New Sarum* in the County aforesaid; and now here at this Day comes the said *William* by his said Attorney, and the said Justices appointed to take Assizes, before, &c. have sent here their Record in these Words, to wit, Afterwards at the Day and Place within contained, before Sir *Thomas Rokeby*, Knt. one of the Justices of our Lord the King appointed to hold Pleas before the King himself, and Sir *John Powell*, Knt. one of the Justices of the said Lord the King of the Bench, Justices of the said Lord the King, appointed to take Assizes in the County of *Wilt.* by Form of the Statute, &c. came as well the within named *William Phillips*, Gent. Executor of the Last Will and Testament of *William Phillips*, Gent. his Father lately deceased, as the within named *Gilbert*, Bishop of *Salisbury*, and *John Berrow*, Clerk, by their Attornies within mentioned: And the Jurors of the Jury, whereof Mention is within made, being summoned, likewise came, who being elected, tried, and sworn to speak the Truth of the within Contents upon their Oath say, that the said *Gilbert*, Bishop of *Salisbury* altogether refused to admit and institute the within named *John Symes* to the Church within mentioned on Presentation of the said *William Phillips* the Testator, as the said *William Phillips* the Executor hath within thereupon in his Replication alledged. And the said

Return of
the Postea.

Find that
the Bishop
refused to
admit upon
the Plain-
tiff's Presen-
tation; and
the Church
full upon the
Bishop's Col-
lation, and
the yearly
Value 120 l.

Jurors upon their Oath further say, that the Church aforesaid is full of the said *John Berrow* by the Collation of the said *Gilbert* Bishop of *Salisbury*, as is by him within alledged, and that the Church aforesaid is, and from the Time in which, &c. was of the yearly Value of One hundred and twenty Pounds in all Issues beyond Reprisals: And the Jurors aforesaid assess the Damages of the said *William Phillips* the Executor, for his Costs and Charges by him concerning his Suit in this Behalf applied, to forty Shillings; therefore no Respect being had to the before said forty Shillings of the Damages, Costs and Charges aforesaid, assessed by the said Jury by Occasion of the Hinderance aforesaid, because such Damages by the Law of the Land are in no wise in this Case to be adjudged; It is considered that the said *William Phillips* the Executor do recover against the said Bishop of *Salisbury* and *John Berrow*, his Presentation to the Church aforesaid, and his Damages to the Value of that Church for the Half of one Year, which amounts to sixty Pounds, by the Jury aforesaid in Form aforesaid assessed; and let him have a Writ to the Archbishop of *Canterbury*, Primate of all *England* and Metropolitan of that Place, for that the said Bishop of *Salisbury* is a Party, &c. because the said *John Berrow* is admitted and instituted to the same Church at the Collation of the said Bishop of *Salisbury*, and is inducted in the same, to remove the said *John Berrow* from the said Church, and that he may admit a fit Person to the said Church at the Presentation of the said *William Phillips* the Executor; and the aforesaid Bishop of *Salisbury* and *John Berrow* in Mercy, &c. Afterwards, to wit, on *Monday* next after three Weeks from the Day of *St. Michael* in this same Term, before our Lord the King at *Westminster* come the aforesaid Bishop and *John Berrow*, by *Adrian Moore* their Attorney, and say, That in the Record and Proceedings aforesaid, and also in the giving of the Judgment aforesaid, there is manifest Error, in this, to wit, That by the Record aforesaid it appears, that the said Judgment given in Form aforesaid was given for the said *William Phillips* against the said Bishop and *John Berrow*, where by the Law of the Land of this Kingdom of *England*, that Judgment ought to have been given for the said Bishop and *John Berrow* against the same *William Phillips*, therefore in that there is manifest Error: There is also Error in this, to wit, that the Record aforesaid before the Lord the King now here sent is defective in this, to wit, That the original Writ, and the Return of the same between the Parties aforesaid in the Plea aforesaid, are totally omitted out of the said Record, and yet remain in the Custody of the Keeper of the Writs of the Lord the now King of the Bench, not certified to the same Lord the King. And the same Bishop and *John Berrow* pray a Writ of the said Lord the now King to be directed to the Keeper of the Writs of our said Lord the now King, of the Bench aforesaid, to certify the Writ aforesaid, together with the Return of the same Writ to the said

Judgment
and Award-
ing a Writ to
the Bishop.

Misericordia

Errors as-
sign'd.

Certiorari.

Lord

Quare Im-
pedit return-
ed.

Lord the King: And it is granted to them, &c. whereby it is given in Charge to *William Thursby*, Esq; Keeper of the Writs of our Lord the King of the Bench aforesaid, that having searched for the original Writs in the County of *Wilts*, of the Term of the *Holy Trinity* in eighth Year of the Reign of our said Lord the now King, being in his Custody of Record, he may send what he shall find in the same concerning the aforesaid Writ, together with the whole Return of the same Writ, as fully and intirely as they remain in his Custody, to the Lord the King, without delay, wheresoever, &c. together with the Writ of the said Lord the King, to himself thereupon directed, &c. Which said Keeper of Writs, by Virtue of that Writ to him thereupon directed, hath certified to the same Lord the King, That having searched all the original Writs of his County of *Wilts*, of the said Term of the *Holy Trinity* in the eighth Year of his Reign, in his Custody filed of Record, he hath a certain original Writ between the Parties aforesaid of the Plea aforesaid in his Custody filed of the same Term, the Tenor of which said Writ together with the Return of the same, followeth in these Words: *William* the Third, by the Grace of GOD, of *England, Scotland, France and Ireland* King, Defender of the Faith, &c. To the Sheriff of *Wilts*, Greeting: Command *Gilbert*, Bishop of *Salisbury*, and *John Berrow*, Clerk, that justly and without Delay, they permit *William Phillips*, Executor of the Will of *William Phillips* his Father lately deceased, to present a fit Person to the Church of *Stanton*, which is vacant [or void] and belongs to his Gift, as he saith, and whereof he complains that the said Bishop and *John* do unjustly hinder him: And unless they and the said Executor shall make you secure of Prosecuting their Claim, then summon by good Summoners the aforesaid Bishop and *John*, that they may be before our Justices at *Westminster*, from the Day of the *Holy Trinity* in fifteen Days, to shew wherefore they have not so done. And have you there the Summoners and this Writ. Witness, *Thomas* Archbishop of *Canterbury* and the rest of the Keepers and Justices of the Realm at *Westminster*, on the twenty-eighth Day of *May* in the eighth Year of our Reign. *Hale*. Essoin for the Bishop adjourned until three Weeks from the Day of *Saint Michael*; the same Day for the Clerk of Essoin for the Clerk adjourned until the Morrow of *Saint Martin*; the same Day for the Bishop. *W. Hall*. Pledges of Prosecuting, *John Doe* and *Richard Roe*, Summoners, *Tho. Eyre*, *Jo. Russel*, *Edward Somner*, Esq; Sheriff; which said Writ of *Certiorari*, together with the Return thereof is assiled amongst the Records without Day of that Term: And upon this the said *William Phillips*, by *Joseph Sherwood* his Attorney, likewise comes forthwith here in Court: And thereupon the said Bishop and *John Berrow* (as before) say, that in the Record and Proceedings aforesaid, and also in the giving of the Judgment aforesaid there is manifest Error, alledging the Errors aforesaid by them in Form aforesaid above alledged, and pray

that the Judgment aforesaid, for the aforesaid and other Errors being in the Record and Proceedings aforesaid, may be reversed, annulled, and altogether deemed as none; And that they be restored to all Things which by Occasion of the Judgment aforesaid they have lost; And that the Court of the said Lord the King now here proceed to the Examination as well of the Record and Proceedings aforesaid, as of the said Matters above assigned for Errors, and that the said *William* do rejoin to the Errors aforesaid: Upon which the same *William Phillips* saith, That there is no Error either in the Record and Proceedings aforesaid, or in the giving of the Judgment: And in like Manner prayeth that the Court of the said Lord the King now here do proceed to the Examination as well of the Record and Proceedings aforesaid, as of the said Matters above assigned for Errors; and that the said Judgment in all Things be affirmed: But because the Court of the said Lord the King now hereof are not yet advised of giving their Judgment of and concerning the Premises, Day is thereupon given to the Parties aforesaid, before the Lord the King, until

Judgment affirmed.

where-
soever, &c. of hearing their Judgment thereupon, for that the Court of the said Lord the King now here thereof are not yet, &c.

Pleas before the Lady the Queen at Westminster, of the Term of St. Michael in the Third Year of the Reign of our Lady Anne, now Queen of England, &c. Roll 144.

Goddard against Smith and another.

Middlesex, to wit, **B**E it remembered, 'That heretofore, that is Salk. 21.
to say, in the Term of the *Holy Trinity* 6 Mod. 261.
last past, before our Lady the Queen at *Westminster* came *Richard* 3 Salk. 245.
Goddard by *Henry Wright* his Attorney, and brought into Rep. A. Q.
the Court of our said Lady the Queen then there his certain Bill 56.
against *Richard Smith* and *Christopher Preston* in the Custody of Holt 497.
of the Marshal, &c. of a Plea of 'Trespas upon the Case; and S. C.
there are Pledges of Prosecuting, namely, *John Doe* and *Richard Roe*, which said Bill followeth in these Words, that is to
say, Middlesex, to wit, *Richard Goddard* complains of *Richard*
Vol. II. I i i Smith

Declaration
in Case on
Conspiracy
for a false
and mali-
cious Indi-
cment of Bar-
retry, where-
of he was
acquitted.

Indiement
at Hicks's
Hall.

Smith and *Christopher Preston* in the Custody of the Marshal of the *Marshalsea* of our Lady the Queen, before the Queen herself being, for that, to wit, That whereas the said *Richard Goddard* is a good, true, faithful, peaceable and honest Subject, and Liege Man of our Lady the now Queen, and was of a good Name, Fame, Reputation, Conversation, Behaviour and Condition, and as a good, true, faithful, peaceable and honest Liege Man and Subject of the said Lady the now Queen, being without any Scandal, Imputation or Reproach, and hath not behaved or demeaned himself at any Time from the Time of his Nativity hitherto as a Barretor or Disturber of the Peace of the said Lady the Queen, nor was in Suspicion of the like Crime amongst his Neighbours and other Subjects of the said Lady the Queen to whom the said *Richard Goddard* was known, and by Reason of his honest and quiet Conversation aforesaid for the whole Time aforesaid, lawfully and honestly gained and acquired great Credit and Esteem, and also divers great Gains and Profits from his Neighbours and other Subjects of our said Lady the Queen, with whom the said *Richard Goddard* had Commerce for the Support of himself and his Family: Nevertheless the said *Richard Smith* and *Christopher* not ignorant of the Premises, but contriving and maliciously intending not only to deprive him the said *Richard Goddard* of his good Name, Fame and Esteem aforesaid, but also to bring him the said *Richard Goddard* into Ignominy and publick Disgrace, that by Reason thereof the Subjects of the said Lady the Queen might withdraw themselves from the Fellowship of him the said *Richard Goddard*, and might altogether cease and desist from Dealing and having Commerce with him in any Manner, on the thirteenth Day of *September* in the first Year of the Reign of the said Lady *Anne*, now Queen of *England*, &c. at the Parish of *St. James Clerkenwell* in the County aforesaid, then and there having had a Conspiracy between themselves falsely and maliciously to cause the said *Richard Goddard* to be indicted as a Barretor and publick Disturber of the Peace of the said Lady the Queen, without any Cause or Colour of such Crime being committed by him the said *Richard Goddard*, they the same *Richard Smith* and *Christopher* at the Parish aforesaid in the County aforesaid, in Prosecution and Execution of their malicious Intention and Conspiracy aforesaid at the general Quarter-Sessions of the Peace of our Lady the Queen held for the County of *Middlesex* at *Hicks's Hall* in *St. John's street* in the County aforesaid, before *John Bennet*, *Henry Hawley* and *Joseph Offley*, Esquires, and other their Fellow Justices of the said Lady the Queen, appointed to keep the Peace in the County aforesaid, and also to hear and determine divers Felonies, Trepasses, Contempts and Misdemeanors in the same County committed, falsely and maliciously caused and procured the said *Richard Goddard*, with Intent to defame the same *Richard Goddard*, without any lawful or true Cause, to be indicted by the Name of *Richard Goddard*

Richard Goddard, late of the Parish of *St. James Clerkenwell* in County of *Middlesex*, Yeoman, for that the same *Richard Goddard*, on the first Day of *January* in the first Year abovesaid, and divers other Days and Times as well before as afterwards, at the Parish aforesaid in the County aforesaid, had been and then was a common Barretor, and a common, daily and publick Disturber of the Peace of the said Lady the now Queen, and also a common and turbulent Slanderer and Sower of Quarrels and Discords amongst his quiet and honest Neighbours, so that he moved, procured, and stirred up divers Contentions and Controversies, and also Brawlings, Quarrels and Fights at the Parish aforesaid in the County aforesaid, and elsewhere in the said County of *Middlesex*, amongst divers Liege Subjects of the said Lady the Queen, to the great Disturbance of the Peace of the said Lady the now Queen, to the evil Example of all others in the like Case offending, and against the Peace of the said Lady the now Queen, her Crown and Dignity, &c. and did falsly and maliciously prosecute and cause to be prosecuted the said Indictment against the said *Richard Goddard*, until the said Lady the now Queen caused that Indictment afterwards for certain Reasons to come to be determined before her: And the Sheriff of the County aforesaid was commanded that he should not omit, &c. but cause him to come and answer, &c. And he the said *Richard Goddard* afterwards, to wit, in the Term of *St. Michael* in the second Year of the Reign of the said Lady the now Queen, in the Court of our Lady the Queen, before the Queen herself, the same Court being at *Westminster*, was according to the Law and Custom of this Kingdom of *England* in a due and lawful Manner thereof discharged. By Pretence of which said Premisses against him the said *Richard Goddard*, by the said *Richard Smith* and *Christopher Preston* in Form aforesaid published, done, exhibited and prosecuted, the same *Richard Goddard* is not only very much hurt and injured in his good Name, Fame, Credit and Reputation aforesaid, and disquieted and weakened in his Body, but was also forced to expend and lay out divers large Sums of Money in and about Acquitting and Discharging himself of the said Indictment, and defending his Innocence, to the very great Discredit and extreme Impoverishment of him the said *Richard Goddard*, and to the Damage of the said *Richard Goddard* of twenty Pounds: And thereupon he brings Suit, &c.

Removed by
Certiorari.

Discharged.

And now at this Day, to wit, *Monday* next after three Weeks from the Day of *St. Michael* in this same Term, till which Day the said *Richard Smith* and *Christopher* had Leave to imparl to the said Bill, and then to answer, &c. before our Lady the Queen at *Westminster* comes as well the said *Richard* by his said Attorney, as the said *Richard Smith* and *Christopher* by *Edmund Butler* their Attorney: And the said *Richard* and *Christopher* defend the Force and Injury, when, &c. and say that they are in no Manner guilty of the Premisses above laid to their Charge, as the said

Richard

Richard Goddard above complains against them: And of this they put themselves upon the Country; and the said *Richard Goddard* likewise, &c. Therefore let a Jury come thereupon before our Lady the Queen at *Westminster*, on *Monday* next after the *Morrow of Souls*, and who neither, &c. to recognize, &c. because as well, &c. The same Day is given to the Parties aforesaid there, &c.

Pleas before our Lady the Queen at Westminster, of the Term of the Holy Trinity in the Third Year of the Reign of the Lady Anne, now Queen of England, &c. Roll 211.

Tenant against Gouldwin.

Salk. 21,360.
6 Mod. 311.
Holt 500.
S. C.

Case for not
repairing a
Partition
Wall, where-
by the Plain-
tiff was pre-
judiced.

Middlesex, to wit, **BE** it remembered, That heretofore, that is to say, in the Term of *Easter* last past, before the Lady the Queen at *Westminster* came *Robert Tenant* by *John Rice* his Attorney, and brought into the Court of our said Lady the Queen then there his certain Bill against *Luke Gouldwin*, in Custody of the Marshal, &c. of a Plea of Trespas upon the Case; and there are Pledges of Prosecuting, namely, *John Doe* and *Richard Roe*; which said Bill followeth in these Words that is to say, *Middlesex*, to wit, *Robert Tenant* complains of *Luke Gouldwin* in the Custody of the Marshal of the *Marshalsea* of our Lady the Queen, before the Queen her self being, for that to wit, That whereas he the said *Robert*, on the first Day of *October* in the first Year of our Lady *Anne*, now Queen of *England* &c. and from thence always hitherto was possessed and still is possessed of one Messuage, situate, lying and being in *Friith-street* in the Parish of *St. Anne* within the Liberty of *Westminster* in the said County of *Middlesex*, for a certain Term of Years not yet ended, and used to lay and keep in his Cellar, Parcel of his Messuage aforesaid, good Stores of Coals and Ale for the Use of his Family, and also to be sold and merchandized to divers Persons who were wont to buy of that Commodity in his Messuage aforesaid, to the great Profit and Advantage of him the said *Robert*; which said Cellar lies contiguous, and for all the Time aforesaid did lie contiguous to a Messuage of the said *Luke* in the Parish aforesaid

aforefaid, and used to be separated and fenced from a Privy-house, Parcel of the aforefaid Messuage of the said *Luke*, by a thick and close Wall which belongeth to the said Messuage of the said *Luke*, and of Right ought to have been repaired by the said *Luke* for the whole Time aforefaid: Nevertheless the said *Luke* not being ignorant of the Premises, but contriving and fraudulently intending him the said *Robert* in this Behalf unjustly to aggrieve, and wholly to deprive him the said *Robert* of the Use and Advantage of the Cellar of his Messuage aforefaid, and to hinder him of the Profit of his Commerce aforefaid, on the same first Day of *October* in the abovefaid Year of the Reign of the said Lady the Queen, and from thence always hitherto, so negligently kept and repaired the said Wall, although often requested to repair the same, to wit, by the said *Robert*, on the same first Day of *October* in the Parish aforefaid, that for Want of due Care and Reparation of the same Wall, the Filthinesses and nasty Things of the said Privy-house flowed out of the same Privy-house by the decayed Parts and Breaches of the Wall aforefaid into the Cellar aforefaid of the same *Robert*, and overflowed the same Cellar, to wit, in the Parish aforefaid, for the whole Time aforefaid; whereby the same *Robert* lost the Use of his Cellar, and the Profit of his Commerce aforefaid, for all the Time aforefaid: Wherefore the same *Robert* saith, that he is injured and hath Damage to the Value of One hundred Pounds: And thereupon he brings Suit, &c. And now at this Day, to wit, *Friday* next after the Morrow of the *Holy Trinity* in this same Term, until which Day the said *Luke* had Leave to impart to the said Bill, and then to answer, &c. before our Lady the Queen at *Westminster* comes the aforefaid *Robert* by his said Attorney, and prays that the said *Luke* may Answer to the Declaration: And the said *Luke*, although on the same Day solemnly required, doth not come nor say any Thing in Bar or Preclusion of the aforefaid Action of the said *Robert*; whereby the same *Robert* remains against him thereupon undefended; for which Reason the said *Robert* ought to recover his Damages against the said *Luke*: But because it is not known by the Court of the said Lady the Queen now here before the Queen herself, what Damages the said *Robert* hath sustained by Occasion of the Premises in this Behalf; Therefore the Sheriff is commanded, that he, by the Oath of Twelve honest and legal Men of his Bailiwick, do diligently inquire what Damages the said *Robert* hath sustained, as well by Occasion of the Premises, as for his Costs and Charges by him about his Suit in this Behalf applied; And that he send the Inquisition which he shall take thereon to our Lady the Queen at *Westminster* on *Monday* next after three Weeks from the Day of *St. Michael*, under his Seal and the Seals of those by the Oath of whom he shall take the said Inquisition, together with the Writ of our Lady the Queen to him for that Purpose directed: The same Day is given to the said *Robert* there, &c.

Averment of the Usage.

Breach.

Plaintiff damaged.

Judgment by Nil dicit.

Pleas before our Lady the Queen at Westminster, of the Term of St. Hillary in the Third Year of the Reign of our Lady Anne, now Queen of England, &c. Roll 102.

Brook against Hustler.

Salk. 56.
Rep. A. Q.
76. S. C.

England, to wit, **O**UR Lady the Queen hath sent to her trusty and well-beloved Sir *Thomas Trevor*, Knt. her Chief Justice of the Bench, her Writ closed in these Words, to wit, *Anne* by the Grace of GOD, of *England, Scotland, France and Ireland* Queen, Defender of the Faith, &c. To her trusty and well-beloved Sir *Thomas Trevor*, Knt. her Chief Justice of the Bench, Greeting: For as much as in the Record and Proceedings, and also in the Giving of Judgment of the Plaint which was in our Court before you and your Brethren, our Justices of the Bench, by our Writ between Sir *William Hustler*, Sir *Richard Osbaldeston*, Knts. and *William Osbaldeston*, Esq; and *Thomas Brook* late of *Overslocton* in the County of *York*, Yeoman, of a Debt of Seventy and nine Shillings and eleven Pence, which the same *William, Richard* and *William* demand of the said *Thomas*, as it is said, manifest Error hath intervned, to the great Damage of the same *Thomas*, as we are informed by his Complaint; We willing that the Error, if any was, be duly amended, and that full and speedy Justice be done to the Parties aforesaid in this Behalf, do command you, that if Judgment be thereupon given, then you send to us distinctly and plainly, under your Seal, the Record and Proceedings aforesaid, with all Things touching the same, and this Writ; so that we may have them from the Day of *Easter* in fifteen Days wheresoever we shall then be in *England*, that we having inspected the Record and Proceedings aforesaid may cause further to be done thereupon for amending the said Error, which of Right and according to the Law and Custom of our Kingdom of *England* shall be meet to be done. Witness Our self at *Westminster* the second Day of *March* in the second Year of our Reign.

Hungerford

The Answer of Sir *Tho. Trevor*, Knt. Chief Just. within named The Record and Proceedings of the Plaint within mentioned, with all Things touching the same, I send before our Lady the Queen wheresoever, &c. at the Day within contained in a certain Record to this Writ annexed, as I am within commanded. *Tho. Trevor*

Plea

Pleas inrolled at *Westminster* before Sir *Thomas Trevor*, Knt. and his Fellow Justices of our Lady the Queen of the Common Bench, of the Term of *St. Hillary* in the second Year of the Reign of our Lady *Anne*, by the Grace of GOD, of *England*, *Scotland*, *France* and *Ireland* Queen, Defender of the Faith, &c. Roll 1228.

Yorkshire, to wit, *Thomas Brook*, late of *Overfloeton* in the County aforesaid, Yeoman, was summoned to answer Sir *William Hustler*, Knt. Sir *Richard Osbaldeston*, Knt. and *William Osbaldeston*, Esq; of a Plea that he render to them Seventy and nine Shillings and eleven Pence, which he owes to them and unjustly detains, &c. And whereupon the same Sir *William Hustler*, Sir *Richard* and *William Osbaldeston*, by *Robert Hopkinson* their Attorney, say, That our Lord *James* the First, late King of *England*, was seised in Right of his Crown of *England* as of Fee and Right of and in the Court-Leet and View of Frank-pledge with the Appurtenances, and all and every Thing which to a Court-Leet or View of Frank-pledge belonged, or in any Manner appertained, or ought to belong or appertain, within the Manors or Lordships, Villages or Hamlets of *West Bretton*, *Cawthorn*, *Overfloeton* and *Netherfloeton* in the said County of *York*, and within the Precincts of the same Manors or Lordships, Villages and Hamlets, and every of them, in the said County of *York*, being or not being Parcel of the Duchy of *Lancaster*, of all resident and inhabiting within the Manor or Lordship, Village and Hamlet before said, and within the Precincts of the same Manors or Lordships, Villages and Hamlets, and every or any of them. The said Court-Leet and View of Frank-pledge aforesaid to be holden twice by the Year within the Manors or Lordships, Villages and Hamlets aforesaid, or any of them, or within the Precincts of the same Manors or Lordships, Villages and Hamlets, or any of them, at such Days and Times in the Year as the said Lord King *James* the First, his Heirs or Assigns should see fit, convenient and necessary, according to the Law and Custom of this Kingdom of *England*, before the Steward of the same Lord the King of that Court, or the Deputy of such Steward for the Time being: And being so seised the late King *James* the First afterwards, by his Letters Patent under the Great Seal of *England*, and under the Seal of the Duchy of *Lancaster* in like Manner made, bearing Date at *Westminster* in the County of *Middlesex* on the twenty-ninth Day of *June* in the thirteenth Year of his Reign in *England*, and the forty-eighth in *Scotland*, which the said Sir *William Hustler*, Sir *Richard* and *William Osbaldeston* here in Court produce, as well for and in Consideration of the Sum of twenty Shillings of lawful Money of *England*, well and truly to be paid at the Receipt of his Exchequer at *Westminster* to his own Use, by his beloved Subject *George Wentworth* of *Bulkiffe* in *West Bretton* in the County of *York*,
Gent.

Declaration
for an Amer-
ciament in a
Court-Leet.
Seisin of King
James I. in a
Court-Leet.

Grant there-
of to *Went-*
worth by *Let-*
ters Patent
under the
duchy Seal.

To be held
twice a Year
at such Days
as the Gran-
tee should
think fit.

Grantee sei-
sed and held
several
Courts and
died.

Descend to
his Son and
Heir who
was seized.

Gent. whereof the same late Lord the King did acknowledge himself to be fully satisfied and paid, as for divers other good Causes and Considerations the same Lord the King especially moving, of his especial Grace and certain Knowledge and meer Motion did give and grant for himself, his Heirs and Successors to the said *George Wentworth*, his Heirs and Assigns for ever, that they should and might have, hold and enjoy within the Manors or Lordships, Villages, or the Hamlets of *West Bretton*, *Cawthorn*, *Overfloeton* and *Netherfloeton*, and every of them, in the said County of *York*, and within the Precincts of the same Manors or Lordships, Villages and Hamlets, and every of them, in the said County of *York*, being or not being Parcel of the said Duchy of *Lancaster*, a Court-Leet and View of Frank-pledge, to be held of all the Residents and Inhabitants, and other Residents coming within the Lordships or Manors, Villages and Hamlets aforesaid, and within the Precincts of the same Manors or Lordships, Villages and Hamlets, and every or any of them; To hold the said Court-Leet and View of Frank-pledge twice by the Year from Time to Time within the Manors or Lordships, Villages and Hamlets aforesaid, or any of them, or within the Precincts of the same Manors or Lordships, Villages and Hamlets, or any of them, at the same Places, Days and Times at which the said *George Wentworth*, his Heirs or Assigns, should see fit, convenient and necessary, according to the Law and Custom of this Kingdom of *England*, before the Steward of the same *George Wentworth*, his Heirs and Assigns for the Time being, or before the Deputy of such Steward for the Time being; and all and whatsoever to the said Court-Leet or View of Frank-pledge belonged, or in any wise appertained, or in any Manner ought to belong or appertain; and also all and singular Amerciaments, Fines, Forfeitures, Pains, Penalties, Perquisites, Profits, Liberties, Preeminences, Privileges, Rights and Jurisdictions whatsoever, which at the said Courts-Leet or View of Frank-pledge to the said Lord the King, or his Successors, in any Manner whatsoever might or ought to belong; by Virtue of which said Letters Patent the said *George Wentworth* was seized as of Fee and Right of and in the Court-Leet and View of Frank-pledge aforesaid with the Appurtenances; And held divers Courts and Views of Frank-pledge within the Manors or Lordships, Villages or Hamlets of *West Bretton*, *Cawthorn*, *Overfloeton* and *Netherfloeton* aforesaid, according to the Gift and Grant aforesaid in the Letters Patent contained: And the said *George* being so seized of the Court-Leet and View of Frank-pledge aforesaid, with the Appurtenances, afterwards, to wit, on the second Day of *June* in the Year of our Lord One thousand six hundred and thirty-eight, at *Netherfloeton* aforesaid died, after whose Death the said Court-Leet and View of Frank-pledge with the Appurtenances did descend to *William Wentworth*, Gent. as Son and Heir of the said *George*, whereby the said *William Wentworth*, Son and Heir of the said *George*, was seized as of Fee and Right of

and in the Court-Leet and View of Frank-pledge aforesaid with the Appurtenances; and being so seised thereof, the same *William* afterwards, to wit, on the fourth Day of *March* in the Year of our Lord One thousand six hundred and thirty-nine, at *Netherfloc-ton* aforesaid, died without any Issue of his Body; after whose Death the said Court-Leet and View of Frank-pledge, with the Appurtenances descended to *Thomas Wentworth*, Esq; afterwards Sir *Tho. Wentworth*, Baronet, as Brother and Heir of the said *William Wentworth*, whereby the said *Thomas Wentworth*, as Brother and Heir of the said *William Wentworth*, was seised of and in the Court-Leet and View of Frank-pledge aforesaid, with the Appurtenances as of Fee and Right; And being so seised thereof, the said Sir *Thomas* afterwards, to wit, on the first Day of *April* in the Year of our Lord One thousand six hundred and seventy-six, at *Netherfloc-ton* aforesaid died, without any Issue of his Body issuing; after whose Death the said Court-Leet and View of Frank-pledge, with the Appurtenances, did descend to Sir *Matthew Wentworth*, Baronet, as Brother and Heir of the said Sir *Thomas Wentworth*, whereby the said *Matthew*, as Brother and Heir of the said Sir *Thomas Wentworth*, was seised of and in the Court-Leet and View of Frank-pledge aforesaid, with the Appurtenances, as of Fee and Right; And being so seised thereof, the same Sir *Matthew* afterwards, to wit, on the second Day of *August* in the Year of our Lord One thousand six hundred and seventy-eight at *Netherfloc-ton* aforesaid died; after whose Death the said Court-Leet and View of Frank-pledge with the Appurtenances descended to Sir *Matthew Wentworth*, Baronet, as Son and Heir of the said Sir *Matthew Wentworth* the Brother, whereby the said Sir *Matthew Wentworth* the Son was seised of and in the Court-Leet and View of Frank-pledge aforesaid, with the Appurtenances as of Fee and Right: And the said Sir *Matthew* the Son being so seised thereof, afterwards, to wit, on the eighth Day of *December* in the Year of our Lord One thousand six hundred and ninety-three, at *Netherfloc-ton* aforesaid, by a certain Indenture of Bargain and Sale made between the said Sir *Matthew Wentworth* the Son, of the one Part, and the said Sir *William Hustler*, Sir *Richard Osbaldeston* and *William Osbaldeston* of the other Part, the other Part whereof sealed with the Seal of him the said Sir *Matthew* the Son, the same Sir *William*, Sir *Richard* and *William Osbaldeston* produce here in Court, the Date of which is the same Day and Year, in Consideration of five Shillings to him in Hand paid by the said Sir *William*, Sir *Richard* and *William Osbaldeston*, bargained, and sold to them the said Sir *William*, Sir *Richard* and *William* the said Court-Leet and View of Frank-pledge with the Appurtenances, to have and to hold to the same Sir *William Hustler*, Sir *Richard* and *William Osbaldeston*, their Executors, Administrators and Assigns, from the Day of the Date of the said Indenture to the End and Term of the Year then next following and fully to be compleat and ended:

And died without Issue whereby they descended to his Brother.

Who died also without Issue, whereby they descended to his Brother.

After whose Death they descended to his Son, who enter'd.

And by Lease and Release conveyed to the Plaintiffs.

Plaintiffs seized.

Defendant an Inhabitant within the Jurisdiction of the Leet, and owed Suit.

Court held Apr. 24. 1703.

Notice was given to the Inhabitants.

Defendant made Default in not appearing, wherefore the Jury presented him.

By Virtue of which said Bargain and Sale, and by Force of the Statute in that Behalf made and provided of transferring Uses into Possession, the same Sir *William Hustler*, Sir *Richard* and *William Osbaldeston* were in the Possession of the Court-Leet and View of Frank-pledge aforesaid for that Term; And being thereof so possessed, and the said Sir *Matthew Wentworth* the Son being seized of the Reversion of the Court-Leet and View of Frank-pledge aforesaid, with the Appurtenances, as of Fee and Right, afterwards, to wit, on the ninth Day of *December* in the Year of our Lord One thousand six hundred and ninety-three aforesaid, at *Netherfloodon* aforesaid, by a certain other Indenture made between him the said Sir *Matthew Wentworth* the Son of the one Part, and the said Sir *William Hustler*, Sir *Richard Osbaldeston* and *William Osbaldeston* of the other Part, the other Part whereof sealed with the Seal of the said Sir *Matthew* the Son, the same Sir *William Hustler*, Sir *Richard* and *William Osbaldeston* produce here in Court, the Date whereof is the same Day and Year above-mentioned, He the said Sir *Matthew Wentworth* the Son, released to the same *William Hustler*, Sir *Richard* and *William Osbaldeston*, their Heirs and Assigns, all the Estate, Right, Title and Interest of him the said Sir *Matthew Wentworth* the Son, of and in the Court-Leet and View of Frank-pledge aforesaid, with the Appurtenances: By Virtue of which Premises the said Sir *William Hustler*, Sir *Richard* and *William Osbaldeston* were and still are seized of and in the Court-Leet and View of Frank-pledge aforesaid with the Appurtenances as of Fee and Right; and that *Thomas Brooke* on the twenty-fourth Day of *April* in the Year of our Lord One thousand seven hundred and three, and long before, was resident and an Inhabitant at *Overfloodon* aforesaid, within the Jurisdiction of the Leet and View of Frank-pledge aforesaid, and ought to do Suit at the Court of View of Frank-pledge aforesaid: And they the said Sir *William Hustler*, Sir *Richard* and *William Osbaldeston*, being so as aforesaid seized of the Court-Leet and View of Frank-pledge aforesaid, with the Appurtenances, the Court-Leet and View of Frank-pledge aforesaid was held at *Netherfloodon* aforesaid within the Manors and Lordships aforesaid the said twenty-fourth Day of *April* in the Year of our Lord One thousand seven hundred and three, before *Richard Witton*, Esq; Steward of the said Sir *William Hustler*, Sir *Richard* and *William Osbaldeston*, of that Court of which Court so to be held due Notice was given to the Residents and Inhabitants within the Manors, Lordships, Villages and Hamlets aforesaid, to wit, at *Netherfloodon* aforesaid; and that the said *Thomas Brooke* did not do his Suit nor appear at that Court but made Default; wherefore at the same Court, by the Jurors who were sworn and charged in the same Court to inquire and present those Things which appertained to the said Court-Leet and View of Frank-pledge, it was presented upon their Oath, that the said *Thomas Brooke* then was resident and an Inhabitant within the

Manors aforesaid, and within the Jurisdiction of the Court of View and Frank-pledge aforesaid, and ought to have done Suit to the Court of View and Frank-pledge aforesaid: And that the said *Thomas Brooke*, although he was then solemnly summoned, did not appear but made Default, by Reason whereof the same *Thomas Brooke* was then and there by the same Court amerced, which said Amercement, by *Joseph Senior* and *Timothy Roads* then Residents and Inhabitants within the Manors aforesaid, then and there chosen and sworn Assessors by the same Court, was then in due Manner assessed to Thirty nine Shillings and eleven Pence of lawful Money of *England*; whereof the said *Thomas Brooke* afterwards, to wit, the Day and Year last mentioned, at *Netherstowton* aforesaid, had Notice, whereby an Action accrued to the same *Sir William Hustler*, *Sir Richard* and *William Osbaldeston*, to demand and have of the said *Thomas Brooke* the said thirty nine Shillings and eleven Pence Parcel of the aforesaid seventy nine Shillings and eleven Pence. And whereas also the said *Thomas Brooke* afterwards, to wit, on the first Day of *July* in the Year of our Lord One thousand seven hundred and three, at *Netherstowton* aforesaid, borrowed of the said *Sir William Hustler*, *Sir Richard* and *William Osbaldeston* forty Shillings, Residue of the aforesaid seventy nine Shillings and eleven Pence, to be paid to the said *Sir William Hustler*, *Sir Richard* and *William Osbaldeston*, when he should be thereunto required: Nevertheless the said *Thomas Brooke*, although often requested, hath not yet paid the aforesaid seventy nine Shillings and eleven Pence, nor any Part thereof, to the same *Sir William Hustler*, *Sir Richard* and *William Osbaldeston*, or either of them, but hath hitherto refused and still refuses to pay the same to them or any of them; wherefore they say that they are injured and have Damage to the Value of One hundred Shillings: And thereupon they bring Suit, &c.

And he was amerced by the Court and Assessed by two assessors, Chosen and Sworn, at 19 s. 11 d. of which he had Notice. By which their Action accrued to the Plaintiffs.

Mortuarius for 40 s.

And the aforesaid *Thomas Brooke* by *Henry Wood* his Attorney comes and defends the Force and Injury when, &c. and says nothing in Bar or Preclusion of the said Action of the said *Sir William Hustler*, *Sir Richard* and *William Osbaldeston*: Whereupon the same *Sir William Hustler*, *Sir Richard* and *William Osbaldeston* remain against the said *Thomas Brooke* thereupon undefended: Therefore it is considered that the said *Sir William Hustler*, *Sir Richard* and *William Osbaldeston* do recover against the said *Thomas Brooke* their said Debt; and their Damages by Occasion of the Detention of that Debt to eight Pounds, by the Court here adjudged to the same *Sir William Hustler*, *Sir Richard* and *William Osbaldeston*, by their Assent; And the same *Thomas Brooke* in Mercy, &c.

Nil dicit.

Judgment.

Afterwards, that is to say, on *Tuesday* next after eight Days from the Day of *St. Hillary* in the same Term, before the Lady the Queen at *Westminster* comes the aforesaid *Thomas Brooke* by *Thomas Harvey* his Attorney, and saith that in the Record and Proceedings aforesaid, and also in giving of the Judgment aforesaid

Errors assigned.

said, there is manifest Error, in this, to wit, that the Declaration
 aforesaid in the Record aforesaid mentioned; and upon which the
 Judgment aforesaid in Form aforesaid is given, and the Matter in
 the same contained, are not sufficient in Law, to have or maintain
 that Judgment thereupon given in Form aforesaid; and so the said
 Judgment thereupon in Form aforesaid given is erroneous and void
 in Law; and therefore in that there is manifest Error. There is
 Error also in this, that where it appears by the said Record, that
 the said Judgment in Form aforesaid given, was given for the said
 Sir *William Hustler* Knight, Sir *Richard Osbaldeston* Knight and
William Osbaldeston, against him the said *Thomas Brooke*; whereas
 by the Law of the Land of this Kingdom of *England*, Judgment
 in the Plea aforesaid ought to have been given for the said *Thomas*
Brooke against them the said Sir *William Hustler*, Sir *Richard Os-*
baldeston, and *William Osbaldeston*; and therefore in that there is
 manifest Error: And he prays, that the said Judgment for the Er-
 rors aforesaid, and others being in the Record and Proceedings
 aforesaid, be revoked, annulled and altogether deemed as none;
 And that the same *Thomas Brooke* be restored to all Things, which
 by Occasion of the Judgment aforesaid he hath lost; And that the
 said Sir *William Hustler* Knight, Sir *Richard Osbaldeston* Knight,
 and *William Osbaldeston* may rejoin to the Errors aforesaid, &c.
 And the said Sir *William Hustler* Knight, Sir *Richard Osbaldeston*
 Knight, and *William Osbaldeston*, by *Adrian Moore* their Attorney,
 come and forthwith say that there is not any Error either in the
 Record and Proceedings aforesaid, or in the giving the Judgment
 aforesaid; And pray that the Court of the Lady the Queen now
 here, may proceed to the Examination as well of the Record and
 Proceedings aforesaid, as of the Matters aforesaid by him the said
Thomas Brooke above assigned for Errors, and that the Judgment
 aforesaid be in all Things affirmed.

Joinder in
Errors.

Judgment af-
firmed.

Pleas

Pleas before the Lord the King and Lady the Queen at Westminster, of the Term of the Holy Trinity in the Third Year of the Reign of our Lord William and Lady Mary, now King and Queen of England, &c. Roll 166.

Barker against Winch.

Barkshire, to wit, **S***IMON Winch* late of *Bray* in the County *Salk. 36.*
afore said, *Gent.* was attached to Answer *Comb. 186.*
Thomas Barker Gentleman, of a Plea, wherefore with Force and *3 Salk. 34.*
Arms he entered into six Messuages, six Cottages, sixty Acres of *Cases B. R.*
Land, sixty Acres of Meadow, three hundred Acres of Pasture and *13 S. C.*
forty Acres of Wood with the Appurtenances in the Parish of *Bray*, *Ejectment in*
which *William Teildall* and *Rebecca* his Wife demised to the said *B. R. by Ori-*
Thomas, for a Term which is not yet past; And other six Messuages, *ginal upon*
six other Cottages, sixty other Acres of Land, sixty other Acres of *two several*
Meadow, three Hundred other Acres of Pasture and forty other *Demises.*
Acres of Wood, with the Appurtenances, in the Parish of *Bray*
afore said, which *John Lidgold* the Younger also demised to the
said *Thomas Barker* for a Term which is not yet past, and him
from his Farms afore said ejected, and other Enormities to him did,
to the great Damage of the said *Thomas*, and against the Peace of
our Lord the King and our Lady the Queen now, &c. And
whereupon the same *Thomas Barker* by *William Turbill* his At-
torney complains, that whereas the said *William Teildall* and *Re-*
becca his Wife on the first Day of *April* in the third Year of the
Reign of our Lord and Lady now King and Queen of *England, &c.*
at the Parish of *Bray* demised to the same *Thomas* the afore said
six Messuages, six Cottages, sixty Acres of Land, sixty Acres of
Meadow, three Hundred Acres of Pasture and Forty Acres of
Wood with the Appurtenances, to have and to occupy the same
Tenements with the Appurtenances to the same *Thomas Barker* and
his Assigns, from the twenty fifth Day of *March* then last past to
the full End and Term of five Years from thence next following,
fully to be compleat and ended; by Virtue of which said Demise
the same *Thomas Barker* entered into the said Tenements with the
Appurtenances last above said, and was possessed thereof; And also
that whereas the said *John Lidgold* on the same first Day of *April* *Second De-*
in the third Year above said, at the Parish of *Bray* afore said, demi- *mise.*
sed to the same *Thomas Barker* the afore said six other Messuages,
six other Cottages, sixty other Acres of Land, sixty other Acres of
Meadow,

Pleads in Abatement that the Lands are Parcel of a Manor in Ancient Demesne.

And only impleadable in the Court of the Manor by Writ of Right Close.

Demurrer.

Meadow, Three hundred other Acres of Pasture and forty other Acres of Wood with the Appurtenances, to have and to occupy the same Tenements with the Appurtenances to the said *Thomas* and his Assigns, from the aforesaid twenty fifth Day of *March* then last past unto the the full End and Term of five Years from thence next following, and fully to be compleat and ended; by Virtue of which Demise the said *Thomas* entered into the said Tenements with the Appurtenances last above-mentioned, and was possessed thereof; And being so possessed thereof, and being also possessed of the said several Tenements with the Appurtenances as aforesaid, the said *Simon Winch* afterwards, to wit, on the said first Day of *April* in the third Year aforesaid with Force and Arms, &c. entered into the aforesaid Tenements with the Appurtenances, which the said *William* and *Rebecca* his Wife had demised to the said *Thomas Barker* in Form aforesaid, for the said Term first above specified which is not yet past, and into the aforesaid Tenements with the Appurtenances which the said *John Lidgold* had demised to the same *Thomas Barker* in Form aforesaid, for the said Term last above specified, which is not yet past, and him the said *Thomas Barker* from his Farms aforesaid ejected, and other Enormities, &c. to the great Damages, &c. and against the Peace, &c. Wherefore he saith that he is injured, and hath Damage to the Value of One hundred Pounds: And thereupon he brings Suit, &c. And the aforesaid *Simon Winch* by *John Sandwell* his Attorney comes and says, that the Tenements in the Declaration aforesaid above specified are, and from the Time of which the Memory of Man is not to the contrary were, Parcel of the Manor of *Bray* in the County aforesaid, of which said Manor our Lord the King and our Lady the Queen are seised in Right of the Crown, and that the Manor aforesaid is of the Antient Demesne of the Crown of our Lord the King and our Lady the Queen; And that the aforesaid Tenements are pleadable, and have been pleaded in the Court of the Manor aforesaid, by Writ of Right Close of our Lord the King and our Lady the Queen, from the Time of which the Memory of Man is not to the contrary: And this he is ready to verify as the Court shall consider, &c. Wherefore he prays Judgment if the Court of the Lord the King and the Lady the Queen here will take Consuance of Plea thereupon, &c.

And the aforesaid *Thomas Barker* saith, that notwithstanding any Matters by the said *Simon Winch* above in his Plea alledged, the Court of our Lord the King and Lady the Queen here ought not to be precluded from having Cognizance of the Plea aforesaid because he saith that the Plea aforesaid by him the said *Simon* in Manner and Form aforesaid above pleaded, and the Matter in the same contained, are not sufficient in the Law to preclude the said Court of our Lord the King and Lady the Queen now here from having Cognizance of the Plea aforesaid, to which said Plea and the Matter in the same contained the said *Thomas Barker* need

need not, neither by the Law of the Land is he bound, in any Manner to answer: And this he is ready to verify: Wherefore for Want of a sufficient Answer in this Behalf, the said *Thomas* prays Judgment and his Term aforesaid yet to come of and in the Tenements aforesaid with the Appurtenances, together with his Damages by Occasion of the Trespass and Ejectment aforesaid, to be to him adjudged, &c. And for Causes of Demurrer in Law upon that Plea, he the said *Thomas*, according to the Form of the Statute in such Case thereupon lately made and provided, shews and demonstrates to the Court here these Causes following, to wit, For that the said *Simon* in his said Plea hath not shewn to the Court here, nor hath alledged, that the Tenements aforesaid with the Appurtenances in the said Declaration mentioned, nor any Parcel thereof, are held of the Lord and Lady the now King and Queen of their Manor of *Bray* aforesaid; And because the Plea aforesaid is insensible, uncertain and wants Form.

And the aforesaid *Simon* saith, that the Plea aforesaid by him the said *Simon* in Manner and Form aforesaid above pleaded, and the Matter in the same contained, are good and sufficient in the Law, to preclude the said Court of the said Lord the King and Lady the Queen now here from having Cognizance of the Plea aforesaid, which said Plea and the Matter in the same contained he the said *Simon* is ready to verify and prove as the Court, &c. And because the said *Thomas* hath not answered to that Plea, nor hath hitherto in any Manner contradicted it, he the said *Simon* as before prays Judgment, if the Court of the said Lord the King and Lady the Queen, now here will or ought to take Cognizance of the Plea aforesaid: But because the Court of the said Lord the King and Lady the Queen now here are not yet advised of giving their Judgment of and concerning the Premises, Day is thereupon given to the said Parties before the Lord the King and Lady the Queen, until three Weeks from the Day of the *Holy Trinity*, wheresoever, &c. of hearing their Judgment therein, for that the Court of our said Lord the King and Lady the Queen now here thereof not yet, &c. At which Day before our Lord the King and Lady the Queen at *Westminster* come the Parties aforesaid by their Attornies aforesaid: But because the Court of our said Lord the King and Lady the Queen now here are not yet advised of giving their Judgment of and upon the Premises, Day is therefore given to the Parties aforesaid before the Lord the King and Lady the Queen, on the Morrow of Souls, wheresoever, &c. of hearing their Judgment thereupon, for that the Court of the said Lord the King and Lady the Queen now here not yet thereof, &c. At which Day before the Lord the King and Lady the Queen at *Westminster* came the said Parties by their said Attornies; whereupon all and singular the Premises being seen, and by the Court of the said Lord the King and Lady the Queen now here more fully understood, and mature Deliberation being thereon

Joinder.

Continuance.

Judgment
that he an-
swer over.

Not guilty.

Awarding a
Venire on a
Trial at Bar,
and Conti-
nuance over
for Defect of
Jurors.

Verdict as to
the first De-
mise.

As to Part
for the
Plaintiff, and
Not guilty as
to other
Part.

And as to
the second
Dmise, find
as to Part for
the Plaintiff,
and Part for
the Defen-
dant.

thereon had, for as much as it appears to the Court of our said Lord the King and Lady the Queen now here, that the said Plea by the said *Simon* in Manner and Form aforesaid above pleaded, and the Matter in the same contained, are not sufficient in Law to preclude the said Court of our said Lord the King and Lady the Queen now here from having Consuance of the Plea aforesaid; It is said by the Court to the said *Simon* that he further Answer to the Declaration aforesaid; and upon this the said *Simon* being solemnly required, by the said *John Sandwell* his Attorney comes and defends the Force and Injury when, &c. and saith that he the said *Simon* is in no wise Guilty of the Trespass and Ejectment aforesaid, as the said *Thomas* above against him complains: And of this he puts himself upon the Country; and the said *Thomas* in like Manner, &c. Therefore the Sheriff is commanded that he cause to come before our Lord the King and Lady the Queen, in eights Day from the Purification of the blessed *Mary*, wheresoever, &c. twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. The same Day is given to the Parties aforesaid, &c. Of which Day the Jury aforesaid between the Parties aforesaid of the Plea aforesaid is thereupon respited between them, before the Lord the King and the Lady the Queen, until one Month from the Day of *Easter* from thence next ensuing, wheresoever, &c. for Defect of Jurors, &c. At which Day before our Lord the King and Lady the Queen at *Westminster* came the said Parties by their said Attornies, and the Jurors of that Jury being likewise summoned came, who were elected, tried and sworn to speak the Truth concerning the Premises; and as to the Trespass and Ejectment aforesaid of and in the said six Messuages, six Cottages, sixty Acres of Land, sixty Acres of Meadow, three hundred Acres of Pasture and Forty Acres of Wood, with the Appurtenances, in the Declaration aforesaid by the said *William Teildall* and *Rebecca* his Wife to the said *Thomas Barker* demised as aforesaid, upon their Oath say, as to one fourth Part of thirty two Acres of Land thereof, with the Appurtenances, held of the Manor of *Lords Lands*, and being in the Tenure of one *William Whitehand*, that the said *Simon Winch* is guilty of the Trespass and Ejectment aforesaid, as the said *Thomas* above against him complains; And as to the residue of the said six Messuages, six Cottages, sixty Acres of Land, sixty Acres of Meadow, three hundred Acres of Pasture, and forty Acres of Wood, with the Appurtenances, by the said *William Teildall* and *Rebecca* to the said *Thomas* demised as aforesaid, the same Jurors upon their Oath aforesaid say, that the said *Simon* is not guilty of the Trespass and Ejectment aforesaid, as the said *Simon* hath above in his Plea alleged; And as to the Trespass and Ejectment aforesaid, of and in the said six other Messuages, six other Cottages, sixty other Acres of Land, sixty other Acres of Meadow, three hundred other Acres of Pasture, and forty other Acres of Wood with the Appurtenances,

in the Declaration aforesaid by the said *John Lidgold* the Younger to the said *Thomas Barker* demised as aforesaid, the same Jurors say upon their Oath aforesaid, as to one fourth Part of thirty two Acres of Land held of the Manor of *Lords Lands*, and being in the Tenure of the said *William Whitehand*, that the said *Simon Winch* is guilty of the Trespass and Ejectment aforesaid, as the said *Thomas* above complains against him, And assesses the Damages of him the said *Thomas* by Occasion of the Premises aforesaid, besides his Costs and Charges by him concerning his Suit in this Behalf applied, to twenty Shillings, and for those Costs and Charges to thirty Shillings: And as to the Residue of the said six other Messuages, six other Cottages, sixty other Acres of Land, sixty other Acres of Meadow, three hundred other Acres of Pasture and forty other Acres of Wood, with the Appurtenances, in the Declaration aforesaid, by the said *John Lidgold* demised as aforesaid, the same Jurors upon their said Oath further say, that the said *Simon Winch* is not guilty of the Trespass and Ejectment aforesaid, as the said *Simon* above in his Plea hath alledged: Therefore it is considered that the said *Thomas Barker* do recover against the said *Simon Winch* his said Term yet to come of and in the said fourth Part of the said thirty two Acres of Land with the Appurtenances held of the Manor of *Lords Lands*, and being in the Tenure of the said *William Whitehand*, Parcel of the said six Messuages, six Cottages, sixty Acres of Land, sixty Acres of Meadow, three hundred Acres of Pasture and forty Acres of Wood, with the Appurtenances, by the said *William Teildall* and *Rebecca* his Wife to the said *Thomas Barker* demised as aforesaid, whereof it is above found by the said Jury, that the said *Simon* is guilty of the Trespass and Ejectment aforesaid, and his said other Term yet to come of and in the said other fourth Part of the said thirty two Acres of Land with the Appurtenances, held of the Manor of *Lords Lands* aforesaid, in the Tenure of the said *William Whitehand*, Parcel of the aforesaid six other Messuages, six other Cottages, sixty other Acres of Land, sixty other Acres of Meadow, three hundred other Acres of Pasture, and forty other Acres of Wood with the Appurtenances by the said *John Lidgold* the Younger to the said *Thomas Barker* demised as aforesaid; whereof it is likewise above found by the Jury aforesaid, that the said *Simon* is guilty of the Trespass and Ejectment aforesaid, and his said Damages by the said Jury in Form aforesaid assessed; and also ninety nine Pounds for his Costs and Charges aforesaid adjudged by the Court of the said Lord the King and Lady the Queen now here to the said *Thomas Barker*, by his Assent, of Increase; which said Damages in the whole amount to One hundred and one Pounds; And that the said *Simon Winch* be taken, &c. and likewise that the said *Thomas Barker* be in Mercy for his false Complaint against the said *Simon Winch*, for the Residue of the Trespass and Ejectment aforesaid; whereof the said *Simon* by the Jury aforesaid in Form aforesaid is acquitted, and that the said *Simon* go thereupon without Day, &c.

Judgment as to what the Defendant is found guilty.

Capiatur.

Acquittal and without Day as to the rest.

Pleas before the Lord the King at Westminster, of the Term of the Holy Trinity in the Third Year of the Reign of our Lord James the Second, now King of England, &c. Roll 1019.

Countess of Plymouth against Throgmorton and his Wife.

Writ of Error.

3 Mod. 153.
Salk. 65. S.C.

THE Lord the King hath given in Charge to his Trusty and Well-beloved Sir *Edward Herbert*, Knt. his Chief Justice of the Common Bench, his Writ closed in these Words, to wit, *James the Second*, by the Grace of GOD, of *England, Scotland, France and Ireland* King, Defender of the Faith, &c. To his Trusty and Well-beloved Sir *Edw. Herbert*, Knt. his Chief Justice of the Common Bench, Greeting: Forasmuch as in the Record and Proceedings, and also in the giving the Judgment of the Plaint which was in our Court before you and your Brethren our Justices of the Common Bench, by our Writ, between *Thomas Throckmorton*, Esq; and *Dorothy* his Wife, Executrix of the Will of Sir *Edward Pick*, Knt. and *Bridget* Countess Dowager of *Plymouth*, Executrix of the Will of *Charles* Earl of *Plymouth*, to the End that the same *Bridget*, Countess Dowager of *Plymouth*, should render to the said *Thomas* and *Dorothy* Seventy-five Pounds, as it said, manifest Error hath intervened to the great Damage of her the said *Bridget*, Countess Dowager of *Plymouth*, as we are informed by her Complaint; We willing that the Error, if any hath been, be in due Manner amended, and that full and speedy Justice be done to the said Parties in this Behalf, do command you, that if Judgment be thereupon given, then you send to us under your Seal distinctly and plainly the Record and Proceedings aforesaid, with all Things touching the same, and this Writ; so that we may have them from the Day of the *Holy Trinity* in three Weeks, wheresoever We shall then be in *England*, that inspecting the Record and Proceedings aforesaid, we may cause to be done farther thereupon, for amending that Error, that which of Right and according to the Law and Custom of our Kingdom of *England* shall be meet to be done. Witness Ourself at *Westminster* on the eighth Day of *June* in the third Year of our Reign.

Santby.

The

The Answer of Sir *Edward Herbert*, Knt. Chief Justice within named. The Record and Proceedings of the Plaint within mentioned, with all Things touching the same, before the Lord the King, wheresoever, &c. at the Day within contained, I send in a certain Record to this Writ annexed, as I am within commanded.

Edw. Herbert.

Pleas at *Westminster* before Sir *Edward Herbert*, Knt. and his Fellow Justices of the Lord the King of the Common Bench, of the Term of *Easter* in the Third Year of the Reign of our Lord *James* the Second, by the Grace of GOD, of *England, Scotland, France* and *Ireland* King, Defender of the Faith, &c. Roll 616.

Middlesex, to wit, *Bridget*, Countess Dowager of *Plymouth*, Executrix of the Last Will and Testament of *Charles* Earl of *Plymouth*, was summoned to answer *Thomas Throckmorton*, Esq, and *Dorothy* his Wife, Executrix of the Last Will and Testament of Sir *Edward Pick*, Knt. of a Plea that she render to them Seventy-five Pounds, which from them she unjustly detains, &c. And whereupon the same *Thomas* and *Dorothy*, by *Charles Draper* their Attorney, say, that whereas the said Earl in his Life-time, to wit, on the third Day of *May* in the thirty-second Year of the Reign of our Lord *Charles* the Second, late King of *England*, &c. at *Islington*, by his certain Deed, which the same *Thomas* and *Dorothy* produce here in Court, dated the same Day and Year, did give an Authority to the same Sir *Edward* to require and receive all and all Manner of Sum and Sums of Money which then were, or at any Time or Times to come within three Years then next following should become due and payable to the same Earl upon any Account whatsoever, and to pay and dispose thereof as he the said Earl from Time to Time should order and appoint the same *Edward* by any Writing or Writings under his Hand during the said three Years, and for the Care and Labour of the said Sir *Edward* in the Premises aforesaid, the said Earl bound himself by the same Writing to pay to the said Sir *Edward* One hundred Pounds by the Year of lawful Money of *England* during the aforesaid three Years, or otherwise that it should be lawful for the said Sir *Edward Pick* to retain and pay to himself the said One hundred Pounds by the Year during the said three Years, out of such Monies as he should receive by Virtue of the said Deed, as by the same Deed more fully appears; And the said *Thomas* and *Dorothy* in fact say, that he the said *Edward* afterwards, and for the Space of three Quarters of a Year from thence next following, at *Islington* aforesaid, from Time to Time did solicit and require divers Persons then Debtors to the said Earl to pay many Sums of Money then from them due and payable to the said Earl: But during the said three Quarters of a Year, or at any Time afterwards, the said Sir *Edward* did not receive any Sums of Money by

Declaration upon a Warrant of Attorney to the Testator by, an Executrix and her Husband.

Salary of 100 l. per Ann. allowed to the Attorney to be deducted out of what he receives.

The Attorney demands several Sums of Money, but none paid.

Whereby
the Action
accrued.

Breach.

Profert of
the Letters
testamentary
produced.

Judgment by
Nil dicir.

Errors at-
signed.

by Virtue of the same Deed, wherewith he could pay himself the said One hundred Pounds, or any Part thereof; whereby an Action accrued to the same Sir *Edward* in his Life-time, to require and have of the said Earl the said Seventy-five Pounds: Nevertheless the said Earl in his Life-time, and the said Countess after his the said Earl's Death, although often requested, or either of them, have or hath not yet paid the Seventy-five Pounds to the said Sir *Edward* in his Life-time, or to the said *Dorothy* after the Death of the said Sir *Edward* while she was sole, or to the said *Thomas* and *Dorothy* after the Marriage between them celebrated, or to any of them, but refused to pay the same to the said Sir *Edward* in his Life-time, and to the said *Dorothy* after the Death of the said Sir *Edward*, and to the same *Thomas* and *Dorothy* after the Marriage between them celebrated; and she the same Countess doth still refuse to render the same to the said *Thomas* and *Dorothy*, and unjustly detains the same in delay of the faithful Execution of the Will of the said Sir *Edward*, and to the Damage of them the said *Thomas* and *Dorothy* of ten Pounds: And thereupon they bring Suit, &c. And the same *Thomas* and *Dorothy* produce here in Court the Letters testamentary of the aforesaid *Edward*, by which it sufficiently appears to the Court here, that she the said *Dorothy* is Executrix of the Will of the said *Edward*, and thereof hath Administration, &c.

And the said *Bridget*, by *William Rymer* her Attorney, comes and defends the Force and Injury, when, &c. and says nothing in Bar or Preclusion of the Action of the said *Thomas* and *Dorothy* aforesaid; whereby the same *Thomas* and *Dorothy* thereupon remain against the aforesaid *Bridget* undefended: Therefore it is considered, That the said *Thomas* and *Dorothy* recover against the said *Bridget* their said Debt, and their Damages by Occasion of the Detention of that Debt, to fifty Shillings, to the same *Thomas* and *Dorothy*, by their Assent, by the Court here adjudged, to be levied of the Goods and Chattels which were the said Earl's at the Time of his Death, being in the Hands of the same *Bridget* to be administered, if she hath so much in her Hands to administer; and if she hath not, that then the Damages aforesaid be levied of the proper Goods and Chattels of the said *Bridget*; and the said *Bridget*, Countess of *Plymouth*, in Mercy, &c.

And the aforesaid *Bridget*, Countess Dowager of *Plymouth*, by *Henry Doughty* her Attorney, cometh and saith, that in the Record and Proceedings aforesaid, and also in giving of the Judgment aforesaid, there is manifest Error, in this, to wit, That the Declaration before said, and the Matter in the same contained, are not sufficient in the Law to have and maintain the Action aforesaid of the said *Thomas* and *Dorothy* thereupon against her the said Countess: Therefore in that there is manifest Error. There is Error also in this, that by the Record aforesaid it appears, That the said Judgment in Manner and Form aforesaid given was given for the said *Thomas*

Thomas and *Dorothy* against her the said Countess, in the Plea before said, whereas by the Law of the Land of this Kingdom of *England*, that Judgment ought to have been given for the same Countess against the said *Thomas* and *Dorothy*; and therefore in this there is likewise manifest Error: And the said Countess further saith, that there is Error in this also, to wit, That there is not any Warrant of Attorney filed of Record in the said Court of Common Bench between the said Parties of the Plea aforesaid, to warrant *Charles Draper* to be Attorney for the said *Thomas* and *Dorothy* against the said Countess in the Plea before said; therefore in that likewise there is manifest Error; wherefore the same Countess prays a Writ of the Lord the King of *Certiorari* to be directed to the Chief Justice of the said Lord the King of the Common Bench, &c. And it is granted to her, &c. by which it is commanded, that Sir *Edward Herbert*, Knt. Chief Justice of the Common Bench aforesaid, examine the Rolls and other Remembrances of the Warrants of Attorney of the County of *Middlesex*, of the Term of *Easter* in the third Year of the Reign of the said Lord the King, being in his Custody of Record, and without delay to certify what in the same he shall find thereupon to the said Lord the King, wheresoever, &c. together with the Writ of the said Lord the King, to him for that Purpose directed, &c. Which said Chief Justice of the Bench aforesaid of our said Lord the King answered, that the Execution of the Writ aforesaid appeared in a Schedule to the same Writ annexed, in which Schedule are contained the Title of the Rolls of the Warrants of Attorney filed of the said Term of *Easter* in the aforesaid Writ specified, being in the Custody of him the said Chief Justice of Record; and the Record of a certain Warrant of Attorney between the Parties aforesaid of the Plea aforesaid in the same Form in which the same Warrant of Attorney is entered of Record in the same Rolls, which said Title and Warrants of Attorney follow in these Words. Rolls of Attornies received before Sir *Edward Herbert*, Knt. Chief Justice of the Lord the King of the Common Bench, and his Brethren, of the Term of *Easter* in the third Year of the Reign of our Lord *James* the Second, by the Grace of GOD, of *England*, *Scotland*, *France* and *Ireland* King, Defender of the Faith, &c.

No Warrant of Attorney, and *Certiorari* prayed.

Entry of the *Certiorari*.

Return of the Chief Justice.

Middlesex, to wit, *Thomas Throckmorton*, Esq; and *Dorothy* his Wife, Executrix of the Last Will and Testament of Sir *Edw. Pick*, Knt. puts in his Stead *Charles Draper* his Attorney, against *Bridget*, Countess Dowager of *Plymouth*, Executrix of the Last Will and Testament of *Charles* Earl of *Plymouth*, of a Plea of Debt, which said Writ is filed amongst the Records without Day, &c. And hereupon the aforesaid *Thomas* and *Dorothy*, by *Michael Johnson* their Attorney, come gratis here in Court, and the aforesaid *Bridget*, Countess Dowager of *Plymouth* as aforesaid, saith, That in the Record and Proceedings, and also in the Giving of Judgment aforesaid, there is manifest Error, alledging the Errors aforesaid by him in Form aforesaid alledged, and prays that the

Warrant of Attorney.

Defendants
rejoin in Er-
ror.

Continuan-
ces.

Judgment
reversed.

said Judgment for the Errors aforesaid, and others being in the Record and Proceedings aforesaid, may be reversed, annulled, and intirely deemed as none; and that she be restored to all which by Occasion of the Judgment aforesaid she hath lost, &c. And that the said *Thomas* and *Dorothy* to the Errors aforesaid may rejoin, &c. And that the Court of the said Lord the King here may proceed to the Examination as well of the Record and Proceedings aforesaid as the Matters aforesaid above assigned for Errors, &c. And the said *Thomas* and *Dorothy* say, that there is not any Error either in the Record and Proceedings aforesaid, or in the Giving of the Judgment aforesaid; And in like Manner pray that the Court of the said Lord the King may proceed to the Examination as well of the Record and Proceedings aforesaid, as of the Matters aforesaid above assigned for Errors, and that the Judgment aforesaid be in all Things affirmed, &c. And because the Court of the said Lord the King now here are not yet advised of giving their Judgment herein; Day is therefore given to the Parties aforesaid before the said Lord the King, until three Weeks from the Day of *St. Michael* then next following, wheresoever, &c. of hearing their Judgment thereon, forasmuch as the Court of the Lord the King now here not yet thereupon, &c. At which Day before the Lord the King at *Westminster* come the Parties aforesaid by their said Attornies: But because the Court of the said Lord the King now here are not yet advised of giving their Judgment of and upon the said Premisses, Day is therefore given to the Parties aforesaid before the Lord the King, until eight Days from the Day of *St. Hillary*, wheresoever, &c. of hearing their Judgment thereon, forasmuch as the Court of the said Lord the King here thereon not yet, &c. At which Day before the Lord the King at *Westminster*, come the Parties aforesaid by their said Attornies: But because the Court of the said Lord the King now here are not yet advised of giving their Judgment of and upon the Premisses, Day is therefore given to the Parties aforesaid before the Lord the King, until fifteen Days from the Day of *Easter* wheresoever, &c. of hearing their Judgment thereon, in regard that the Court of the said Lord the King here therein not yet, &c. At which Day before the Lord the King at *Westminster* come the said Parties by their Attornies aforesaid: Upon which as well the Record and Proceedings aforesaid, and the Judgment given thereon, as the said Causes and Matters above assigned for Errors, being seen and more fully understood and diligently examined by the Court of our said Lord the King here; Forasmuch as it seems to the Court of our said Lord the King now here, that in the Record and Proceedings aforesaid, and also in the giving of the Judgment aforesaid there is manifest Error, It is considered that the said Judgment for the Errors aforesaid, and others in the Record and Proceedings aforesaid, be revoked, annulled and altogether deemed as none; And that the aforesaid *Bridget*, Countess Dowager of *Plymouth*, be restored to all Things which by Occasion of the Judgment aforesaid she hath lost, &c.

Pleas before the Lord the King at Westminster, of the Term of Easter in the Eighth Year of the Reign of our Lord William the Third, now King of England, &c. Roll 291.

Freeman and others *against* Bernard and others.

London, to wit, **BE** it remembered, That heretofore, to wit, in the Term of *St. Hillary* in the sixth Year of the Reign of the Lord *William* the Third, now King of *England*, &c. before the same Lord the King at *Westminster* came *Thomas Freeman* and *Thomas Haggar* by *Benjamin Mould* their Attorney, and brought into the Court of the said Lord the King then there their certain Bill against *Samuel Bernard* and *Thomas Rodbard* in Custody of the Marshal, &c. of a Plea of Trespass upon the Case, &c. and there are Pledges of prosecuting, namely, *John Doe* and *Richard Roe*, which said Bill followeth in these Words; that is to say, *London* to wit, *Thomas Freeman* and *Thomas Haggar* complain of *Samuel Bernard* and *Thomas Rodbard* in the Custody of the Marshal of the *Marshalsea* of the Lord the King, before the King himself being, for that, to wit, that whereas on the eighth Day of *August* in the Year of our Lord One thousand six hundred and ninety three at *London* aforesaid, to wit, in the Parish of *St. Mary le Bow* in the Ward of *Cheap*, it was agreed between them the said *Thomas Freeman* and *Thomas Haggar* and the said *Samuel Bernard* and *Thomas Rodbard* in Manner and Form following; that is to say, That the said *Samuel Bernard* and *Thomas Rodbard* should deliver to the said *Thomas Freeman* and *Thomas Haggar* sixteen Bags of good new Hops of the then next Growth, good Brewers Ware, at thirty and four Shillings by the hundred Weight, and that they should be delivered at or before the twenty fifth Day of *December* then next following, and thereupon in Consideration that the said *Thomas Freeman* and *Thomas Haggar* had paid to the said *Samuel Bernard* and *Thomas Rodbard* one Piece of Gold Coin, called a *Guinea*, of lawful Money of *England* in Part of Payment thereof, and then and there at the special Instance and Request of them the same *Samuel Bernard* and *Thomas Rodbard* had took upon themselves, and had faithfully promised the said *Samuel* and *Thomas Rodbard* to perform the Agreement aforesaid in all Things on the Part of them the said *Thomas Freeman* and *Thomas Haggar* to be performed or fulfilled, according to the Form and Effect

Comb. 440.
Carth. 378.
Salk. 69.
Cases B. R.
130.
3 Salk. 45.
Holt. 79. S.C.

Declaration upon an Agreement to deliver sixteen Bags of Hops before Decemb. 25.

Mutual Promises to perform the Agreement.

Breach in
not deliver-
ing the Hops.

Second
Count upon
another A-
greement in
Writing set
forth, to deli-
ver other six-
teen Bags of
Hops, and
left in the
Hands of a
third Person.

Colloquium
touching the
Agreement.

Mutual Pro-
mises.

fect of the aforesaid Agreement, They the said *Samuel Bernard* and *Thomas Rodbard* took upon themselves, and then and there faithfully promised the said *Thomas Freeman* and *Thomas Haggar*, that they the same *Samuel* and *Thomas Rodbard* would well and truly perform and fulfill the Agreement aforesaid in all Things on the Part of them the said *Samuel* and *Thomas Rodbard* to be performed or fulfilled: Nevertheless the said *Samuel* and *Thomas Rodbard* their Promise and Undertaking aforesaid not at all regarding, but contriving and fraudulently intending the same *Thomas Freeman* and *Thomas Haggar* in this Part craftily and subtilly to deceive and defraud, have not delivered to the said *Thomas Freeman* and *Thomas Haggar*, or either of them, the said sixteen Bags of Hops, or any Parcel thereof, upon or before the said twenty fifth Day of *December* next following after the making the said Agreement, or at any Time afterwards, but have hitherto altogether refused and still do refuse to deliver the same to them. And whereas also afterwards, to wit, on the said eighth Day of *August* in the Year of our Lord aforesaid, at *London* aforesaid, in the Parish and Ward aforesaid, a certain other Agreement was had and made in Writing between the said *Samuel* and *Thomas Rodbard* and them the said *Thomas Freeman* and *Thomas Haggar* in Form following; that is to say, That the said *Samuel Bernard* and *Thomas Rodbard* should deliver to them the same *Thomas Freeman* and *Thomas Haggar* sixteen other Bags of good new Hops of the then next Growth, good Brewers Ware, at the Rate of thirty four Shillings by the hundred; and that they should be delivered upon or before the twenty fifth Day of *December* then next following, which said written Agreement was left in the Hands of one *Thomas Ruck*: And whereas afterwards, to wit, on the same eighth Day of *August* in the Year aforesaid, at *London* aforesaid, in the Parish and Ward aforesaid, a certain Discourse was had and moved between the said *Samuel* and *Thomas Rodbard* and the said *Thomas Freeman* and *Thomas Haggar*, of and concerning the said Agreement last mentioned, and of and concerning the Delivery of two Loads of Hops to the same *Thomas Freeman* and *Thomas Haggar*, by the said *Samuel* and *Thomas Rodbard* to be made, and upon that Discourse between the said *Samuel* and *Thomas Rodbard* and the same *Thomas Freeman* and *Thomas Haggar*, two other Loads of Hops, according to the said Agreement, so as aforesaid left in the Hands of the said *Thomas Ruck*, and that they the same *Thomas Freeman* and *Thomas Haggar* should accept the said Hops last mentioned, according to the said first Agreement last recited; and thereupon in Consideration that they the same *Thomas Freeman* and *Thomas Haggar* then and there at the special Instance and Request of the said *Samuel* and *Thomas Rodbard* had paid to the said *Samuel* and *Thomas Rodbard* one other Piece of Gold Coin, called a Guinea, of lawful Money of *England*, in Part of Payment for the same Hops last mentioned, and had took upon them-
selves

selves, and faithfully promised the same *Samuel* and *Thomas Rodbard* to perform and fulfil the Agreement aforesaid in all Things on the Part of them the said *Thomas Freeman* and *Thomas Haggar* to be performed and fulfilled, according to the Form and Effect of the Agreement aforesaid last mentioned, they the same *Samuel* and *Thomas Rodbard* took upon themselves, and then and there faithfully promised the same *Thomas Freeman* and *Thomas Haggar*, that they the same *Samuel* and *Thomas Rodbard* would well and faithfully perform and fulfil the said Agreement last mentioned in all Things on the Part of them the said *Samuel* and *Thomas Rodbard* to be performed and fulfilled: Nevertheless the aforesaid *Samuel* and *Thomas Rodbard* their said Promises and Undertakings last mentioned in Form aforesaid made not regarding, but contriving and fraudulently intending the same *Thomas Freeman* and *Thomas Haggar* in this Behalf craftily and cunningly to deceive and defraud, have not, nor hath either of them delivered the said two Loads of Hops last mentioned, or any Parcel thereof, to the same *Thomas Freeman* and *Thomas Haggar*, upon or before the said twenty fifth Day of *December* next following after the making the said Promise and Undertaking last mentioned, or at any Time afterwards, but have hitherto altogether refused, and yet do refuse to deliver the same to them; wherefore the said *Thomas Freeman* and *Thomas Haggar* say, that they are injured and have Damage to the Value of Two hundred Pounds: And thereupon they bring Suit, &c.

Breach.

And now at this Day, to wit, *Wednesday* next after fifteen Days from the Day of *Easter*, until which Day the said *Samuel* and *Thomas Rodbard* had Leave to imparle to the said Bill, and then to answer, &c. before the Lord the King at *Westminster*, come as well the said *Thomas Freeman* and *Thomas Haggar* by their said Attorney, as the said *Samuel* and *Thomas Rodbard* by *John Bernard* their Attorney: And the same *Samuel* and *Thomas Rodbard* defend the Force and Injury when, &c. and say that the said *Thomas Freeman* and *Thomas Haggar* ought not to have or maintain their Action aforesaid thereupon against them; because they say, that after the making the several Promises and Undertakings above in the said Declaration specified, that is to say, on the second Day of *November* in the Year of our Lord One thousand six hundred and ninety four, at *London* aforesaid, to wit, at the Parish of *St. Mary le Bow* in the Ward of *Cheap* aforesaid, as well the said *Thomas Freeman* and *Thomas Haggar* as the said *Samuel* and *Thomas Rodbard* did submit and put themselves to the Award, Ordination and Judgment of Sir *John Parsons* Knight and *Richard Hammond* Brewers, Arbitrators, as well on the Part of the said *Thomas Freeman* and *Thomas Haggar*, as on the Part of them the said *Samuel* and *Thomas Rodbard*, indifferently nominated and elected to award, ordain, adjudge and determine of, and upon and concerning all and all Manner of Action and Actions, Cause

A Submission to Arbitration pleaded;

To be made
in Writing
before the
first of De-
cember.

Arbitrators
make their
Award.

and Causes of Actions, Suits, Debts, Bonds, Bills, Specialties, Executions, Accounts, Sum and Sums of Money, Differences, Controversies, Trespasses, Damages, Claims and Demands whatsoever at any Time before then had, moved, commenced, prosecuted, done, promised, committed or depending in Suit, Controversy, Question or Demand, by or between the said *Thomas Freeman* and *Thomas Haggar* and the said *Samuel* and *Thomas Rodbard*, for or by Reason of any Matter, Cause or Thing whatsoever; so that the said Arbitrators should make and give their Award and Determination of and concerning the Premises in Writing indented under their Hands and Seals, ready to be deliver'd to the said *Thomas Freeman* and *Thomas Haggar*, *Samuel* and *Thomas Rodbard*, or either or any of them, at or in the Mansion-House of *Toby Winne* Scrivener, in a Street called *Bartholemew Lane*, near the *Royal Exchange*. London, to wit, in the Parish of *St. Bartholemew Exchange*, in the Ward of *Broadstreet* London, the said Sir *John Parsons* and *Richard Hammond* the Arbitrators aforesaid, having taken upon themselves the Trouble of the said Award, by a certain Writing indented under the Hands and Seals of the said Arbitrators, and ready to be delivered to the said *Thomas Freeman* and *Thomas Haggar*, *Samuel* and *Thomas Rodbard*, either or any of them, did arbitrate, make and give their Award and Determination of and concerning the Premises, that the said *Samuel* and *Thomas Rodbard*, and also the said *Thomas Freeman* and *Thomas Haggar*, or the several respective Executors and Administrators of the said *Samuel* and *Thomas Rodbard*, *Thomas Freeman* and *Thomas Haggar* should mutually sign and seal, and as their Act and Deed deliver to and for the Use of each other, their Executors and Administrators respectively, full and sufficient general Releases and Discharges of all Actions, Suits, Accounts, Debts and Demands whatsoever, in Law or Equity, of or concerning the Premises, to the said Arbitrators as aforesaid in any Manner submitted. And the said *Samuel* and *Thomas Rodbard* say, that they, from the Time of making the said Award, always were and now are ready to Sign and Seal, and as their Acts and Deeds deliver to the same *Thomas Freeman* and *Thomas Haggar* such Releases and Discharges, as by the said Arbitrators are above awarded, if the said *Thomas Freeman* and *Thomas Haggar* should and would be willing to accept those Releases and Discharges from the said *Samuel* and *Thomas Rodbard*: And this they are ready to verify: Wherefore the same *Samuel* and *Thomas Rodbard* pray Judgment, if the said *Thomas Freeman* and *Thomas Haggar* ought to have or maintain their Action aforesaid thereupon against them, &c.

To this the Plaintiffs demurred, and the Defendants joined in Demurrer.

Pleas before our Lord the King and our Lady the Queen at Westminster, of the Term of the Holy Trinity in the Seventh Year of the Reign of William the Third, now King of England, &c. Roll 176.

Bacon against Debary.

London, to wit, **BE** it remembered, That heretofore, that is to say, in the Term of *Easter* last past, before the Lord the King at *Westminster* came *Josiah Bacon* by *William Baker* his Attorney, and brought into the Court of the said Lord the King then there his certain Bill against *David Debary*, otherwise called *David Debary* of *London*, Merchant, in Custody of the Marshal, &c. of a Plea of Debt; and there are Pledges of Prosecuting, namely, *John Dee* and *Richard Roe*; which said Bill followeth in these Words, that is to say, *London*, to wit, *Josiah Bacon* complains of *David Debary*, otherwise called *David Debary* of *London*, Merchant, in the Custody of the Marshal of the *Marshalsea* of our Lord the King, before the King himself being, of a Plea that he render to him Six hundred Pounds of lawful Money of *England*, which he owes to him and unjustly detains, for that, to wit, That whereas the said *David* on the eighth Day of *November* in the Year of our Lord One thousand six hundred and ninety-four, at *London*, to wit, in the Parish of *St. Mary le Bow* in the Ward of *Cheap*, by his certain Writing obligatory, sealed with the Seal of the same *David*, which to the Court of the said Lord the King now here shewn, the Date of which is the same Day and Year, acknowledged himself to be held and firmly bound to the said *Josiah* in the aforesaid Six hundred Pounds, to be paid to the same *Josiah* when he should be thereunto requested: Nevertheless the said *David*, although often requested, &c. hath not yet paid the said Six hundred Pounds to the said *Josiah*, but hath hitherto altogether refused and still doth refuse to pay the same to him, to the Damage of the same *Josiah* of One hundred Pounds: And therefore he brings Suit, &c.

And now at this Day, to wit, *Friday* next after the Morrow of the *Holy Trinity* in this same Term, until which Day the said *David* had Leave to imparl to the said Bill, and then to answer, &c. before the Lord the King at *Westminster*, comes as well the said *Josiah* by his said Attorney, as the said *David* by *John Green* his Attorney, and the same *David* defends the Force and Injury,

Salk. 70.
Skin 679.
Comb. 439.
Carth. 412.
Cases B. R.
129.
Holt 78.
S. C.

Declaration
upon a Bond
of Arbitra-
tion.

Injury, when, &c. and prays Oyer of the Writing obligatory; and it is read to him, &c. he also prays Oyer of the Condition of the same Writing obligatory; and it is read to him in these Words, to wit, 'The Condition of this Obligation is such, That if the above bounden *David Debary*, for and on the Behalf of *Jacob DERNYTER* of *Hamborough*, Merchant, his Executors and Administrators, do and shall well and truly stand to, obey, abide, observe, perform, fulfil and keep the Award, Arbitrament, Order, final End, Determination and Judgment of *Maurice Williams*, *Nicholas Cutler* and *Michael Milford* of *London*, Merchants, or any Two of them, Arbitrators, as well on the Part and Behalf of the above-named *Josiah Bacon*, and by their mutual Assents and Consents indifferently elected, named and chosen to arbitrate, award, order, judge, determine, and a final End to make of, for, upon and concerning all and all Manner of Action and Actions, Cause and Causes of Action, Suits, Debts, Accounts, Reckonings, Sum and Sums of Money, Covenants, Contracts, Promises, Trespasses, Damages, Bonds, Bills, Specialties, Judgments, Extents, Executions, Trespasses, Strifes, Differences, Controversies, Matters, Claims and Demands whatsoever, as now are, or at any Time before the Date above written have been moved, stirred up, or depending between the said *David Debary*, as Attorney to the said *Jacob DERNYTER* of the one Part, and the said *Josiah Bacon* of the other Part, for, touching, or concerning certain Accounts between the said *Josiah Bacon* and the said *Jacob DERNYTER*, so as the said Award, Arbitrament, Order, final End, Determination and Judgment of the said Arbitrators, or any Two of them, of and upon the Premises, be made and set down in Writing indented under their Hands and Seals, and be delivered, or ready to be delivered up unto the said Parties respectively in Difference, requiring the same at or in the now Dwelling-house of *John Chambers*, Scrivener, situate in *Lombard-street*, *London*, on or before the One and twentieth Day of this instant *November*; then this Obligation to be void, or else to stand in full Force and Virtue; which being read and heard, the same *David Debary* saith, that the said *Josiah Bacon* ought not to have or maintain his said Action against him thereupon; because he saith, that the said *Maurice Williams*, *Nicholas Cutler* and *Michael Milford* in the Condition aforesaid named, or Two of them, did not make any Award in Writing indented under their Hands and Seals of, for or concerning the Premises aforesaid in the Condition aforesaid above specified, upon or before the twenty-first Day of *November* in the Condition aforesaid mentioned, according to the Form and Effect of the said Condition: And this he is ready to verify: Wherefore he prays Judgment if the said *Josiah Bacon* ought to have or maintain his Action aforesaid thereupon against him, &c.

No Award
pleaded.

Replies an
Award.

And the said *Josiah Bacon* saith, That he, notwithstanding any Thing by the said *David Debary* above in his Plea alledged, ought not

not to be precluded from having his Action aforesaid thereupon against him the said *David*, because he saith, that after the making the Writing obligatory aforesaid, to wit, upon the twenty-first Day of *November* in the Year of our Lord One thousand six hundred and ninety-four, in the said Condition specified, at *London* aforesaid in the Parish and Ward aforesaid, the said *Nicholas Cutler* and *Michael Milford*, two of the Arbitrators in the said Condition above specified, took upon themselves the Trouble of Awarding and Ordaining of and concerning the Premises in the said Condition above-mentioned, and made their Award in Writing indented under their Hands and Seals between the Parties, and of and concerning the Premises in the said Condition mentioned; by which said Award produced here in Court, the same Arbitrators, reciting, That whereas the said *David*, for and on the Behalf of *Jacob Dernyter* of *Hamborough*, Merchant, and the said *Josiah*, by interchangeable Obligations, bearing Date on the eighth Day of *November* then instant, were bound the one to the other in Six hundred Pounds, conditioned to stand to the Award of the said *Maurice Williams*, *Nicholas Cutler* and *Michael Milford*, or any Two of those Arbitrators, mutually by them elected to adjudge, determine and finally end all and all Manner of Action and Actions, Cause and Causes of Actions, Suits, Debts, Accounts, Reckonings, Sum and Sums of Money, Covenants, Contracts, Promises, Trespasses, Damages, Obligations, Bills, Specialties, Judgments, Extents, Executions, Quarrels, Differences, Controversies, Matters, Claims and Demands whatsoever, which then were, or at any Time before the Date of the Writing obligatory aforesaid had been moved, stirred up, or depending between the said *David Debary*, (as Attorney of the said *Jacob Dernyter*) and the said *Josiah Bacon*, touching the Accounts between the said *Josiah Bacon* and the said *Jacob Dernyter*, so that the Award and Determination of the said Arbitrators, or of any Two of them, should be made in Writing indented, under their or any Two of their Hands and Seals, ready to be delivered to the said Parties in Difference, requiring the same, at or in the then and now Dwelling-house of *John Chambers*, Scrivener, situate in *Lombard-street*, *London*, upon or before the said twenty-first Day of *November*, as by the said Obligations and the Conditions of the same more fully appears; the said *Nicholas Cutler* and *Michael* did award and order the said *David Debary*, his Executors, Administrators or Assigns, on the Part of the said *Jacob Dernyter*, to pay or cause to be paid to the said *Josiah*, his Executors, Administrators or Assigns, the Sum of Three hundred and forty-five Pounds, six Shillings and ten Pence of lawful Money of *England*, upon or before the second Day of *January* then next; and they did further award and ordain, that the said *Josiah Bacon* and the said *David Debary*, on the Behalf of the said *Jacob Dernyter*, upon the Payment of the said Sum of Money as aforesaid, should sign and seal, and

Award set forth.

lawfully

VOL. II. Q q q

Award delivered.

Protestation.

Breach assigned.

lawfully execute and deliver to or for the Use of each of them a good and sufficient Release of all and all Manner of Action and Actions, Cause and Causes of Action, Suits, Debts, Accounts, Reckonings, Sum and Sums of Money, Covenants, Contracts, Promises, Trespasses, Damages, Obligations, Bills, Specialties, Judgments, Extents, Executions, Quarrels, Differences, Controversies, Matters, Claims and Demands whatsoever touching the said Accounts, as by the said Award appears. And the same *Josiah* in fact saith, That the said Award in Form aforesaid made afterwards, to wit, on the same twenty-first Day of *November* in the Year aforesaid, at *London* aforesaid, in the Parish and Ward aforesaid, was delivered as well to the said *Josiah* as to the said *David*, according to the Form and Effect of the Condition of the Writing obligatory aforesaid: And the same *Josiah* further saith, that although he the said *Josiah*, from the Time of making the Award aforesaid, hitherto hath well and truly observed, performed and kept all and singular the Matters and Things in the said Award contained on the Part of him the said *Josiah* to be performed and fulfilled according to the Form and Effect of the same Award; Protesting also that the said *David Debary* from the Time of making the said Award hitherto hath not observed, performed or fulfilled the Award aforesaid in any Things to be performed and fulfilled according to the Form and Effect of the said Award; the same *Josiah* in fact saith, that the said *David Debary* did not pay or cause to be paid to the said *Josiah* the said Sum of Three hundred forty and five Pounds, six Shillings and ten Pence, upon or before the said second Day of *January*, which he then ought to have paid to him, according to the Form and Effect of the said Award: And this he is ready to verify: Wherefore he prays Judgment and his said Debt, together with his Damages by Occasion of the Detention of that Debt, to him to be adjudged, &c.

Demurrer and Joinder, and Judgment for the Defendant.

Pleas

Pleas before our Lady the Queen at Westminster, of the Term of St. Hillary in the Second Year of the Reign of the Lady Anne, now Queen of England, &c. Roll 450.

Winter against Garlick.

City of *Bristol*, to wit, **BE** it remembered, that heretofore, to Salk. 75.

wit, in the Term of *Easter* last past, before our Lady the Queen at *Westminster* came *Edmund Winter* by *Richard Longford* his Attorney, and brought into the Court of the said Lady the Queen then there his certain Bill against *Edward Garlick*, otherwise called *Edward Garlick* of the City of *Bristol*, Apothecary, in the Custody of the Marshal, &c. of a Plea of Debt; and there are Pledges of Prosecuting, namely, *John Doe* and *Richard Roe*, which said Bill followeth in these Words, that is to say, City of *Bristol*, to wit, *Edmund Winter* complains of *Edward Garlick*, otherwise called *Edward Garlick* of the City of *Bristol*, Apothecary, in the Custody of the Marshal of the *Marshalsea* of the Lady the Queen, before the Queen herself being, of a Plea, That he render to him One hundred Pounds of lawful Money of *England*, which he oweth to him and unjustly detains, for that, to wit, that whereas the said *Edward*, on the nineteenth Day of *August* in the thirteenth Year of the Reign of our Lord *William* the Third, late King of *England*, &c. at the City of *Bristol* in the County of the same City, by his Writing obligatory, sealed with the Seal of him the said *Edward*, and shewn to the Court of the Lady the Queen now here, the Date of which is on the same Day and Year, acknowledged himself to to be held and firmly bound to the said *Edmund* in the afore said One hundred Pounds, to be paid to the same *Edmund*, when he should be thereunto afterwards required: Nevertheless the said *Edward*, although often requested, &c. hath not yet paid the said One hundred Pounds to the same *Edmund*, but hath hitherto altogether refused and still doth refuse to pay the same to him, to the Damage of him the said *Edmund* of ten Pounds: And therefore he brings Suit, &c.

Declaration
upon Arbitration-
Bond.

And now at this Day, to wit, *Monday* next after eight Days Plea. from the Day of *St. Hillary* in this same Term, until which Day the said *Edward* had Leave to imparl to the said Bill, and then to answer, &c. before the Lady the Queen at *Westminster* comes as well the said *Edmund* by his said Attorney, as the said *Edward* by

by *John Tilladam* his Attorney; and the said *Edward* defends the Force and Injury when, &c. and prays Oyer of the Writing Obligatory aforesaid; and it is read to him, &c. and he prays also Oyer of the Condition of the same Writing; and it is read to him in these Words, to wit, The Condition of this Obligation is such, that if the above bounden *Edward Garlick*, his Heirs, Executors and Administrators, for his and their Parts and Behalf, do and shall in all Things well and truly stand to, obey, abide, perform, fulfil and keep the Award, Order, Arbitrament, final End and Determination of *John Hind* of the City of *Bristol* before said, Gentleman, and *John Packer* of the same City, Bell-Founder, Arbitrators, indifferently named, elected and chosen as well on the Part and Behalf of the above bounden *Edward Garlick*, as of the above named *Edward Winter*, to Arbitrate, Award, Order, Judge, and Determine of and concerning all and all Manner of Action and Actions, Cause and Causes of Action, Suits, Bills, Bonds, Specialties, Judgments, Executions, Extents, Quarrels, Controversies, Trespases, Damages and Demands whatsoever, at any Time or Times heretofore had, made, moved, brought, consented, prosecuted, done, suffered, committed or depending by and between the said Parties, or either of them, so as the said Award be made in Writing, and ready to be delivered to either of the said Parties requiring the same, on or before the eighth hour in the Afternoon of this present Day; but if the said Arbitrators do not make such their Award of and concerning the Premises by the Time aforesaid, That then if the said *Edward Garlick* his Executors and Administrators, for his and their Parts and Behalves, do in all Things well and truly stand to, obey, abide, perform, fulfil and keep the Award, Order, Arbitrament, Umpirage, final End and Determination of *Robert Godfrey*, Gentleman, of and concerning the Premises, so as the said Umpire do make his Award or Umpirage of and concerning the Premises in Writing, and ready to be delivered to either of the said Parties requiring the same, on or before the eighth Hour in the Afternoon of the Day next ensuing the Date of these Presents, then this Obligation to be void, or else to remain in full Force, Strength and Virtue; which being read and heard, the same *Edward* saith that the said *Edmund* ought not to have or maintain his Action aforesaid thereupon against him; because he saith that the aforesaid *John Hind* and *John Packer*, the Arbitrators in the Condition aforesaid named, made no Award, Order, Arbitration, Conclusion, final End or Determination of and in the Premises in the said Condition abovementioned, at or before the eighth Hour in the Afternoon of the said nineteenth Day of *August* in the thirteenth Year aforesaid, being the Day of the Date of the Writing Obligatory aforesaid; But the same *Edward* further saith, that the aforesaid *Robert Godfrey* the Umpire in the same Condition likewise named, having taken upon himself the Burthen of arbitrating of and concerning the Premises

Pleads no Award made by the Arbitrators, but that the Umpire did.

misses in the said Condition above specified, afterwards and before the eighth Hour in the Afternoon of the Day next following the Date of the Writing Obligatory aforesaid, in the same Condition specified, to wit, at the eighth Hour in the Forenoon of the same Day, at the City of *Bristol* aforesaid in the County of the same City, made his Umpirage in Writing of and concerning the Premises aforesaid, then and there ready to be delivered to the Parties aforesaid in Manner and Form following; that is to say, that all Suits at Law then depending between the aforesaid Parties should cease, and be no further prosecuted; And that the said *Edward Garlick* should pay to the said *Edmund Winter*, at the then Dwelling House of *Samuel Fittall*, situate in *Castle Street* in *Bristol* aforesaid, the Sum of ten Shillings, and the Costs of Law which the said *Edmund Winter* had been at in that Suit; And that after the Payment of the said Sum of ten Shillings in Manner aforesaid, they the said *Edmund Winter* and *Edward Garlick* should give to each other general Releases of all Actions, Suits, Controversies and Demands from the beginning of the World to the nineteenth Day of the then instant *August*, in common Form: And the same *Edward* further saith, that after making the Umpirage aforesaid, and before the Day of exhibiting the said Bill of the said *Edmund*, to wit, on the twenty first Day of *August* in the thirteenth Year aforesaid, at the said Dwelling House of the said *Samuel Fittall*, situate in *Castle-street* in *Bristol* aforesaid, he the same *Edward* was ready, and offered to pay to the same *Edmund* then and there being present the said ten Shillings, and to seal, and as his Deed to deliver to the same *Edmund* a written general Release of all Actions, Suits, Controversies and Demands, from the Beginning of the World unto the said nineteenth Day of *August*, in the Umpirage aforesaid mentioned, in common Form; but the said *Edmund* then and there altogether refused to receive or accept the said ten Shillings and the said written Release from the said *Edward*: And this he is ready to verify: Wherefore he prays Judgment if the said *Edmund* ought to have or maintain his said Action thereupon against him, &c.

The Umpirage set forth that the Defendant should pay Cost of Suit.

Tender and Refusal.

Replies and sets forth the Cause of Action, and levying a Plaint.

And the said *Edmund* saith, that he, notwithstanding any Matters by the aforesaid *Edward* above in his Plea alledged, ought not to be precluded from having his said Action thereupon against him, because he saith that the said *Edward*, before the said Time of making the Writing Obligatory aforesaid, at the City of *Bristol* aforesaid in the County of the same City, and within the Jurisdiction of the Court of our said late Lord the King, held at his said City of *Bristol* before the Mayor and Aldermen of the same City, falsely and maliciously had said and published concerning the same *Edmund* diverse, false, feigned, scandalous and malicious Words; And the same *Edmund*, for the obtaining and recovering Damages by Occasion of the speaking and publishing of those Words, before the said Time of making the Writing Obligatory

Averment of
his Expence
in the Suit.

And their
Submission to
the Award
by the said
Bond.

Notice of his
Expences
and Request,
and Defen-
dant's Refu-
sing to pay.

aforesaid, levied in the said Court of the said late Lord the King, held at the City of *Bristol* aforesaid before the Mayor and Aldermen of the City aforesaid, a certain Plaint against the said *Edward* of a Plea of *Trespas* upon the Case, and thereupon such Proceedings were had, that he the same *Edmund*, at the City of *Bristol* aforesaid in the County of the same City, paid, expended and laid out, in the Prosecution of the aforesaid Plaint against the said *Edmund*, the Sum of four Pounds five Shillings and ten Pence of lawful Money of *England*, and thereupon the same *Edmund* and *Edward* for the Determination of that Suit, and all other Demands whatsoever, afterwards, to wit, on the said nineteenth Day of *August* in the thirteenth Year of the Reign of the said late Lord the King aforesaid, at the City of *Bristol* in the County of the same City, by their several Writings Obligatory, by each to the other of them mutually sealed and delivered, submitted themselves to perform and fulfil the Award of the aforesaid *John Hinde* and *John Packer*, or for want thereof the Umpirage of the aforesaid *Robert Godfrey*, That is to say, the said *Edward* by his Writing Obligatory in the said Declaration abovementioned, and the same *Edmund* in Fact saith, that he the said *Edmund* after the making of the Umpirage aforesaid by the said *Robert*, and before the Day of exhibiting the said Bill of the aforesaid *Edmund*, to wit, on the said twenty first Day of *August* in the thirteenth Year of the Reign of the said late King aforesaid, at the City of *Bristol* aforesaid in the County of the same City, did give Notice to the said *Edward*, that he the aforesaid *Edmund* in Prosecution of the said Suit had paid and expended the aforesaid Sum of four Pounds five Shillings and ten Pence, and then and there demanded that Money of the said *Edward*; and that the said *Edward* at any Time hitherto hath not paid the said four Pounds five Shillings and ten Pence to the same *Edmund*, according to the Form and Effect of the Umpirage aforesaid: And this he is ready to verify: Wherefore he prays Judgment, and his Debt aforesaid, together with his Damages by Occasion of the Detention of that Debt, to him to be adjudged, &c.

Demurrer and Joinder.

The End of the Second Volume.



THE TABLE TO THE PLEADINGS.

A.

Abatement.

1. **I**N a *Homine Repleg'* the Defendant on *Oyer* of the Writ pleads Want of Addition in Abatement Page 705
2. By Tenancy in Common in one of the Defendants in Trespass 709
3. By Misnomer in the Defendant's Christian Name 712
4. By Recovery in a former Action for the same Nuisance 716
5. For that the Defendant at the Time of the Intestate's Death was commorant in another Diocese 750
6. That the Lands are Parcel of a Manor in Ancient Demesne 780

Action on the Case on Assumpsit.

1. For Masons Work done and Materials found for the same 710
2. In Consideration that the Plaintiff would lend the Defendant's Son any Sum not exceeding 5*l.* or trust him with Goods to that Value, the Defendant promised to pay 732

Against B. for Money lent to A. at B.'s Request Page 733

For Money laid out *Ibid.*

3. In Consideration that the Plaintiff promised to marry the Defendant, she when sole promised to marry him 737

For Money laid out for and lent a Woman when sole *Ibid.*

4. By an Administrator for Goods sold and delivered by the Intestate 747

The like on a *Quantum meruit* 748

5. The like by an Administrator during the Executor's Absence for Money lent, and for Money had and received 754

6. On an Agreement to deliver sixteen Bags of Hops before such a Day 783

For Misfeasance.

1. Against a Carrier on the Custom of the Realm for losing Goods delivered to him to carry 703

2. For erecting a Wall so near the Plaintiff's Work-room, that it darkened his Window, whereby he lost the Benefit of his Work-room 715

3. Against

The TABLE to the PLEADINGS.

3. Against a Lessee for Years for negligently keeping his Fire Page 725

4. The like on the Custom of the Realm for negligently keeping Fire in a Close whereby the Plaintiff's Furzes, &c. were burnt 726

5. For holding to Bail, after a common Appearance tendred, where by Law no Bail was required 728

6. For stopping up an Highway leading to the Plaintiff's Colliery 730

7. For taking up an Hoghead of Brandy out of one Cellar and laying it in another so negligently that it was staved 735

For Nonfeazance.

1. Against the Owner of a Ferry for not keeping a Ferry-Boat 719

2. For not repairing a Partition-Wall 770

For a Conspiracy.

1. By causing the Plaintiff to be indicted as a common Barretor 767

Administrator.

See { *Assumpsit* 4, 5.
Debt 1.
Demurrer Special 2.
Monstrans des Faits 1, 2.
Oyer 2.

1. The Pleading of Commitment of Administration by an Official 748

2. The like by the Archbishop of Canterbury during the Executor's Absence 755

Ancient Demesne.

See *Abatement* 6.

4

Arbitrament.

See { *Averment* 6.
Bar 2, 3.
Debt 4.
Monstrans des Faits 4.
Oyer 3.

Averment.

1. That the Work-house, &c. mention'd in the Record of the Judgment, and that mentioned in the present Suit are the same; and that *J.* and *B.* mentioned in the Record of the Judgment, and the now Plaintiff and Defendant are the same Persons, &c. Page 717

2. That *Cestuy que vie* is in full Life 725

3. That the Materials and Work were found and performed for the Ship in the River of *Thames*, and not within the Jurisdiction of the Admiralty 746

4. Of the Life of the Grantor of the next Avoidance of a Church, and of the Indentity of the Church. 762

5. That the Defendant used and of Right ought to repair a Wall 771

6. Of the Delivery of an Award 796

B.

Baron and Feme.

See { *Assumpsit* 3.
Debt 3.

Bar.

1. To an Action against a Ferry-Man for not keeping a Ferry-Boat, That he had built a Bridge in Lieu of the

The TABLE to the PLEADINGS.

the Boat, and kept it in repair, &c.

Page 721

2. By Arbitrament. 791
3. To an Arbitration Bond, by no Award made 795, 797

C.

Continuance.

Per Cur. advisare vult.

1. On a Demurrer to a Plea in Abatement 709, 717, 780
2. To a Replication 709, 713, 722
3. To a Declaration 756
4. On in *Nullo est erratum* pleaded 764, 781

Certiorari.

1. Awarded to the *Custos Brevium* to certify an Original 765
2. Pleading of a *Certiorari* to remove an Indictment. 769
3. To the Chief Justice of C. B. to certify a Warrant of Attorney 787

D.

Debt.

1. By an Administrator on a Bill penal. 751
2. For an Amerciament in a Court-Leet. 773
3. By an Executor and her Husband (on a Letter of Attorney made to the Testator) for a Salary 785
4. On an Arbitration Bond 793, 797

Demurrer general.

1. To a Plea in Abatement 709, 717, 780
2. To a Replication 713, 722
3. To a Declaration 756

VOL. II.

Demurrer special.

1. To a Replication, for that it concludes to the Country Page 709
2. To a Plea in Abatement, that the Defendant at the Time of the Intestate's Death was resident in another Diocese; for that it don't appear that the Intestate was not commorant in the Diocese where Administration was granted 750

Discent.

1. Pleaded of the Moiety of an Advowson 759
2. Of a Court-Leet to the Son and Heir of the Grantee by Letters Patent 774

E.

Ejectment.

1. On two several Demises by Original in B. R. 779

Error.

See { Judgment 1.
Return 2.

Errors assign'd in B. R. 765, 777, 786

Estoppel.

1. For that the Defendant put in Bail by the Name mentioned in the Declaration 713

Executor.

See { Debt 3.
Judgment 5.
Monstrans des Faits 2.

fff

1. That

The TABLE to the PLEADINGS.

1. That C. made his Will, and there-
by constituted D. Executor, who took
upon him the Execution thereof, and
prov'd it

Page 761

G.

Grant.

1. Pleaded of the next Avoidance of
a Church 760
2. Of a Court-Leet by Letters Pa-
tent under the Duchy Seal 773
3. The like by Lease and Release. 775

H.

Homine Repleg'.

Declaration therein. 705

I.

Imparlance.

1. Prayed by Plaintiff to a Plea in
Abatement. 713
2. By the Defendant to a Declara-
tion 705, 716, 721, 725, 729, 731,
734, 739, 749, 752, 769, 791,
793

Inquiry.

A Writ of Inquiry awarded on a
Judgment by *Nil dicit*, in B. R. 771

Issue General.

1. In *Assumpsit* by *Non Assumpsit*
705, 734, 739
2. In Case by Not guilty 725, 727,
729, 731
3. In Debt to a Bill penal by *Non*
est factum 752
4. In Conspiracy by Not guilty 769
5. In Ejectment by Not guilty 782

2

Judgment.

1. In B. R. affirmed in the Exche-
quer Chamber Page 740, 741
2. For the Defendant on a Demur-
rer to a Plea in Abatement 718
3. The like to a Replication 724
4. For the Plaintiff by *Nil dicit* in
Case, B. R. 771
5. By *Nil dicit* in Debt, C. B. 777,
786
6. For the Plaintiff on a Demurrer
to a Plea in Abatement 781
7. On a Verdict in Ejectment where-
by the Defendant as to Part is found
Guilty, and to the Residue Not guilty
782
8. In C. B. reversed in B. R. 786,
788

M.

Monstrans des faits.

1. The Plaintiff brings into Court
the Letters of Administration 752, 755
2. The Plaintiff brings into Court
the Letters Testamentary 761, 786
3. The Plaintiff brings into Court an
Indenture of Agreement between Join-
tenants to present by Turns 758
4. The Plaintiff brings into Court an
Award 795
An Umpirage 799

O.

Oyer.

1. Prayed of a Writ of *Homine Re-*
pleg' 705
2. Of Letters of Administration 749
3. Of the Condition of an Arbitra-
tion-Bond. 794, 798

P. Pre-

The TABLE to the PLEADINGS

P.

Prescription.

1. For a Ferry and Toll for a Passage Page 719
2. For the Inhabitants to pass Toll-free 720

Prohibition.

1. Suggestion for a Prohibition to the Admiralty on the Statute of 13 and 15 R. 2. and 2 H. 4. 742

Possession and Seisin.

1. Pleading of Possession of Lessee by Virtue of a Demise for Years determinable on Lives 724
2. Pleading of a Seisin in Tail by Virtue of the Statute of the 27 H. 8. of Uses 759
3. Seisin of a Court-Leet in the King in Right of the Crown pleaded 773
4. The like in the Grantee by Virtue of Letters Patent Ibid.
5. The like by Virtue of a Lease and Release 775

Protestation.

1. That the Passage was not by Boat, that there was no such Custom, and that the Plaintiff was not an Inhabitant of any antient Messuage 721

Q.

Quare Impedit.

1. On an Agreement by Indenture between Jointenants to present by Turns, the Executor of the surviving Grantee of the next Avoidance. *Plea* by the Bishop, that he presented by Lapse. *Replic'*, That the Intestate

presented J. S. by Writing, and that the Bishop refused. *Rejoind'*, That J. S. took it away and desired Time to prepare himself, but never returned, &c. *Absque hoc*, that he refus'd. *Surr'*, Issue on the Traverse. *Verdict* for the Plaintiff, and a Writ awarded to the Archbishop of Canterbury, &c. Page 758, &c.

R.

Replication.

1. That the Plaintiff is sole seised, *Absque hoc*, that the Defendant *aliquid habuit* 709
2. That the Plaintiff was not admitted to pass over the Bridge 722

Respond Ouster.

See Judgment 6.

Return.

1. Of an *Homine Repleg'* 706
2. Of a Writ of Error 758, 785
3. Of a *Postea* with a *Tales* 727
4. The like without a *Tales* 739, 753, 764
5. Of a *Certiorari* awarded to the *Custos Brevium* 766
6. The like to the Chief Justice of C. B. 787

S.

Satisfaction.

The Form of acknowledging Satisfaction on Record 741

Seisin.

See Possession.

Surr-

The TABLE to the PLEADINGS.

Survivorship.

Pleading of Survivorship of the next Avoidance to one of the Grantees
Page 761

T.

Traverse.

1. That the Defendant is Tenant in Common 709
2. That the Defendant is named as in the Bill 713

Trespass.

For breaking and entring the Plaintiff's Close and Yard, and disturbing his Possession 708

V.

Venire Facias.

1. *Ven. Fac.* (in B. R.) awarded 2

Page 705, 727, 732, 734, 736, 739, 752, 770

2. The like in C. B.
3. Continued *per Vic. non misfit* 764
ibid.
4. The like for Default of Jurors on a Trial at Bar 782

Verdict.

1. For the Plaintiff on Not guilty, with a *Tales* 727
2. The like without a *Tales* 737
3. The like on *Non est factum* 753
4. The like in a *Quare impedit* 764

Uses.

Covenant to stand seised to Uses pleaded 759

F I N I S.

THE TABLE.

A

Abatement of Actions and Writs.

1. **P**RIVILEGE of the Defendant not pleadable in Abatement after Impar lance *Page 1*
2. In Actions *qui tam*, Privilege as Attorney of *C. B.* may be pleaded in Abatement 30
3. Privilege of *C. B.* may be pleaded in Abatement, tho' the Narr' be against him *in Custodia*, and Bail given 1, 2
4. But if he be in actual Custody in *B. R.* he can't plead his Privilege of *C. B.* *ibid.*
5. And where he is sued as Executor or Administrator he can't plead such Privilege 2
6. And for a joint Cause of Action against one privileged, and another not, both must be arrested, and declared against *in Custodia* 544
7. If a Declaration be deliver'd against one in Custody, he has the whole Term to plead in Abatement 515
8. Privilege as Attorney of *C. B.* pleaded, but not saying *suit tempore Brevis, Respond' ouster* 1
9. So a Plea *quod suscepit ordinem Militarem*, held ill, because not said he was a Knight *tempore Billa, &c.* 6
10. Declaration against *J. G. Knt.* he pleads in Abatement that he is Knight and Baronet *Page 50*
11. Privilege of *C. B.* pleaded and that he was not to be sued *alibi sans* Consent; Replication that he did consent, held ill for want of a *Venue* 4
12. Yet any Matter that concerns the Person, need not be pleaded with a *Venue* 6
13. To a Plea of Misnomer which traverses the Name of Baptism, Plaintiff may reply he was known by the Name in the Writ *ibid.*
14. For the Traverse of the Name in the Writ is the Point of the Plea, but both that and the Inducement are material *ibid.*
15. A Feme Covert after Arrest and Bail-Bond given, or Common Bail filed, may plead Misnomer, &c. 7, 8
16. After Bail-Bond forfeited Defendant can't plead in Abatement to the Original Action 519
17. Death of either Party before the *Nisi prius* Day, abates the Suit, and is not aided by the Statute; *aliter* if after the Commission read, tho' before Trial 8
18. Actions

The TABLE.

18. Actions brought by a Mayor and Commonalty are abated by Death of the Mayor Page 398

19. Where Jointenancy is pleaded in Abatement, the Life of the other Jointenant must be averr'd 32

20. Want of Addition, viz. (*Junior*) pleaded in Abatement, held ill because not shewn that *Senior* was in *Custod' Mar.* 7

21. And any Matter that distinguishes the Persons, renders that Addition unnecessary ibid.

22. *Alienee* is pleadable in Bar or Abatement, and triable where the Writ is brought 2

23. And if pleaded in Abatement, the Replication must conclude to the Country; *aliter* if in Bar ibid.

24. A Writ or Bill shall not be abated if not prayed by a proper Conclusion of the Plea 298

25. In Replevin *prisel in auter lieu* is good in Abatement; but if concluded with Prayer of a Return, 'tis ill 3

26. Matter of Disability pleadable to the Action, shall not be pleaded to the *Scire Facias* on the Judgment 2

27. Action by two Executors, and Probate only by one pleaded in Abatement, but *Resp' ouster* 3

28. In Debt against an Executor, Plea that he is Administrator is not in Bar, but Abatement 296

29. In *Assumpsit*, no Plea to say he was Bailiff, and that Account lay and not Case 9

30. In Trespass, Defendant can't plead Tenancy in Common in himself in Abatement, but may in a Stranger, 4

31. In Replevin Property in a Stranger may be pleaded either in Bar or Abatement 94

32. And where in Replevin the Plea in Abatement is to the Point of the Action, as Property is, the Defen-

dant shall have a Return without Avowry Page 94

33. But where any collateral Matter is pleaded in Abatement, no Return shall be *sans* Avowry ibid.

34. In Assize, if the Defendant plead in Abatement, he must plead over in Bar at the same time 83

See also *Addition, Misnomer, Privilege, Variance.*

Abatement of Nuisances, vide Tit' Nuisance.

Acceptance, vide Tender and Refusal.

Accessory, vide Principal.

Account.

1. Where an express Promise is by a Bailiff to render Account of Money, &c. *Assumpsit* will lie as well as Account 9

2. *Indeditatus assump'* for Money received *ad computandum*: Moved in Arrest of Judgment, that Account lay, and not *Assumpsit*, and held aided after Verdict ibid.

3. In Account the Defendant may wage his Law, if the Receipt was by his own Hands, but not if by the Hands of another 683

4. In Action of Account against one as Bailiff, the Defendant is to have Allowances made him upon the Account 9

5. Since the Statute 22 Car. 2. an Administrator is bound to account without Citation 315

6. And one intitled to a Distribution by that Statute may sue an Administrator to prove his Account 316

Actions

The TABLE.

Actions in General.

1. Infinity or Multiplicity of Actions for the same Cause are to be avoided Page 12
2. Therefore Case lies not for a publick Nufance, except some particular Damages accrue thereby 12, 16
3. And none can have an Action without a particular Injury or particular Right 16
4. Yet a single Act may be a Ground for several Actions where divers are injured thereby 32
5. Also a Person may be twice sued for the same Act, which may include divers Offences 552
6. As for an Assault, &c. Indictment lies for Breach of the Peace, and Action for Damages to the Party *ibid.*
7. So for Adultery, Suit lies in the Spiritual Court, and Action at Common Law for Battery of the Wife *ibid.*
8. Bringing an Action is not actionable, except some special collateral Wrong be expressly shewn 14
9. But if one not concerned procure A. to sue B. without Cause, B. may have an Action against him *ibid.*
10. So if one maliciously cause another to be indicted, &c. whereby he is damnified, &c. vide *Actions on the Case* 14, 15
11. In all Cases where an *Indebit' assump'* lies, Debt also lies at Election 23
12. The Master of a Ship for taking and detaining her, *per quod impeditus fuit*, &c. may have Case for his special Damage or Trover 11
13. The Plaintiff in one Action can't join his own Right and another's 10
14. *Indebitatus* to the Testator and *in simul comput'* to the Administrator are not joinable *ibid.*
15. A Contract and a Tort can't be joined in the same Action *ibid.*
16. Therefore *Assumpsit* on the Con-

stom of the Realm and Trover can't be joined against a Carrier Page 10

17. Where two joint Merchants make B. their Factor, and one dies leaving an Executor, the Executor and Survivor can't join in an Action 444

18. Tenants in Common can't join as Plaintiffs in Ejectment 423

19. Divers Members of a Corporation, &c. can't join in a *Mandamus* to be restored 436

20. A Tenant for Years erects a Nufance, and makes an Underlease to B. Plaintiff may have an Action against either 460

21. But one may have a new Action for continuing the same Nufance. For every new Dropping, &c. is a new Nufance 10, 11

22. Said, That as a Matter *ex post* may defeat an Action, so it may give a new one (*sed Quare*) 11

23. For after Recovery in Assault and Battery, tho' it prove a Mayhem in Consequence, one can't have Battery and Mayhem *ibid.*

24. Yet a Matter *ex post* may abate an Action, as where one beats my Servant, and he dies *ibid.*

25. For in that Case *Actio moritur cum Persona* 12, 210

26. But where a Tort is to a Man's Property or Possession, *Actio non moritur*, &c. 210, 314

27. Where a Statute gives a Right, the Common Law gives an Action to recover it 415

28. Where two joint Merchants are, and one dies, the Action survives to the other, but not the Duty or Interest 444

29. Where one releases his Right he can't pursue his Action or Remedy: But if he has a Right and several Remedies, the Discharge of one does not discharge the other 422

30. At Common Law all Actions were to be laid in the proper County,

The T A B L E.

ty, that the Jury might be *de vicine-
ta* Page 688

Action on the Case.

1. If one undertakes to do a Thing without Hire or Reward, no Action lies for the Nonfeasance 26
2. But *contra* where he enters upon the doing it, and any Misfeasance be thro' his Neglect or Mismanagement *ibid.*
3. As where one assumes to take up a Hoghead of Wine in one Cellar and lay it down in another, and lays it down so negligently that it is staved, &c. *ibid.*
4. It lies not by particular Persons for a publick Nuisance without special Damage (but Indictment, &c. does) 12, 16
5. As where a common Ferry is at L. for the Inhabitants to pass Toll-free, an Action lies for taking Toll, but not for keeping up the Ferry 12
6. It lies for not repairing the Partition-Wall of a Privy, *pro defectu cuius* Filth ran into the Plaintiff's Cellar 22, 360
7. It lies by the Owners for arresting a Ship by Process of the Admiralty *infra Corp' Com'*, whereby his Voyage was lost 31
8. But for stopping a Way leading to the Plaintiff's Colliery with Intent to deprive him of the Profits, &c. tho' a special Damage was shewn, the Court were divided 16, 17
9. For 'tis not sufficient to say Customers would not come, but must shew they were coming and were hindered thereby 17
10. Lies not by a Burgess against a Constable for refusing to take his Vote for a Parliament Man, *per 3 contra Holt* 19, 20
11. Nor against an Officer for a false Return to Parliament, but on the Sta-

tute 7, 8 W. 3. *Vide Page 21, 503, 504*

12. Nor against a Postmaster for Exchequer-Bills lost out of a Letter delivered at the Post-Office; *per 3 contra Holt* 17
13. But, *per Holt*, an Officer is responsible both for himself and Deputies, whether his Trust arise by the Common Law, or by Statute 18
14. As Innkeepers, Carriers, &c. taking Rewards, are answerable for those that act under them *ibid.*
15. And whoever takes a publick Employment is bound to serve the Publick, &c. therein *ibid.*
16. And a Deputy is also chargeable as a Wrong-doer, and his Act may forfeit the Office of the Principal *ibid.*
17. It lies by an Executor against an Officer for a false Return of a *Fi. Fa.* in the Testator's Life-time within 4 E. 3. c. 7. 12
18. For by the Execution, a Right was vested in the Testator, & *non moritur*, &c. *Contra* of Mesne Process *ibid.*
19. It lies for negligently keeping his Fire in a Field, whereby another's Corn is burnt, or other Damage done 13
20. But not for negligently keeping Fire, &c. against a Lessee at Will, by a Lessor seized in Fee 19
21. *Secus* if the Lessor has only a Term for Years or Life, or if a Stranger is damnified *ibid.*
22. If a Lessee assigns his whole Term, and the Assignee burns the House by Negligence, that Action lies not 13
23. *Contra* where he assigns only Part thereof, and it appears he has a residuary Interest *ibid.*
24. It lies where a Person not concerned, procures one to sue another without Cause 14, 15
25. So for maliciously causing one to be indicted, whereby he is damnified

The TABLE.

fied either in Person, Reputation or Property Page 14, 15

26. As for maliciously causing, &c. *per quod* he was put to great Expence, tho' the Indictment was insufficient 15

27. So for maliciously causing one to be indicted of a Riot, &c. after Acquittal by Verdict 13

28. But *Nolle prosequi* is not sufficient Evidence to maintain a Declaration in Case of such Acquittal 21

29. It lies not by an Administrator under the King's Letters Patent, for maliciously putting in Caveats, *per quod*, &c. 13

30. Nor for bringing an Action where nothing is due, without some special collateral Wrong, which must be shewn 14

31. In case for maliciously holding to special Bail, the Declaration ought to shew the Sum due, and the Process specially, and that the Action is determined 15

32. Where the Grantee of Estovers may have *Case* against the Grantor, and where *Trespass*; Vide 638

Action of the Case on Assumpsits.

1. *Indebitatus Assumpsit* lies in no Case but where Debt lies 23

2. But where one receives Money to another's Use, it lies against the Receiver 24, 27, 28

3. And where one pays Money by Mistake on an Account, or by any mere Deceit, he may have this Action 22

4. But not where it is paid knowingly upon an illegal Consideration *ibid.*

5. *Ergo* not where Money is paid by an Obligor upon any usurious Bond *ibid.*

6. Nor for Money delivered to a Solicitor, &c. to bribe Custom-House-Officers, &c. and laid out accordingly *ibid.*

7. It lies for one that pays Money on a Policy of Insurance, believing the Ship lost when it is not Page 22

8. It lies on a Promise to pay so much new Money in Consideration of so many Pieces received of old Money 25

9. So, on a Promise to pay 50*l.* in Consideration of a Note of 50*l.* under a third Person's Hand, delivered by the Plaintiff to the Defendant *ibid.*

10. For the Note being Evidence of a Debt due, the parting with it is a good Consideration *ibid.*

11. So, in Consideration that the Plaintiff would receive *A.* &c. into his House *ut Hospites*, and find 'em Meat, &c. with an Averment that he did receive, &c. tho' not said, *ut Hospites* *ibid.*

12. So in Consideration the Plaintiff would accept the Defendant to be his Debtor, instead of *A.* with Averment that he did accept, &c. and held good after Verdict though no express Averment that *A.* was discharged 29

13. But not against *B.* for Money lent *A.* at *B.*'s Request, because the Promise is only collateral 23

14. Yet it lies against a Stranger on his Promise to pay the Debt if the Officer would restore Goods taken on a *Fi Fa'* 28

15. It lies on a conditional Promise, as, Prove it, and I will pay you; if sued within six Years 29

16. It lies by an Executor against one that receives Money by Order of an Administrator, *i. e.* after Administration repealed 27

17. So by an Executor on a Promise to himself for a Debt to the Testator, if he declares accordingly 28

18. But if he declares on a Promise to the Testator, and the Statute of Limitations is pleaded, he can't give in Evidence a Promise to himself *infra sex Annos* *ibid.*

B

19. *A.*

The TABLE.

19. *A.* living a former Wife, marries *B.* and receives her Rents, &c. *B.* may have *Indeb. Assumps.* against *A.* for so much Money received to her Use Page 28

20. It lies where in Consideration the Plaintiff promis'd to marry the Defendant, she promis'd to marry him, because mutual Promises 24

21. But if the Promise be on one Side only, or if that on either Side is not binding, the whole is *Nudum Pactum* ibid.

22. If one assumes, &c. as Action on the Case, *Numb.* 3. and see *Baron* and *Feme*, *Numb.* 8.

See also *Bills of Exchange* and *Quantum meruit*. And for Actions on the Case for Words, vide *Words*.

Actions Popular.

1. An Action *qui tam* on a Penal Statute will not lie against an Attorney of *C. B.* in any other Court 30

2. For an Informer cannot sue where he pleases, tho' the King himself may ibid.

3. And Prosecutors *qui tam* are look'd on as common Informers ibid.

4. Where a Statute gives a Penalty to a Stranger, and he sues, he is a common Informer, and shall pay Costs on 18 *El. c.* ibid.

5. But where it is to the Party grieved he is not a common Informer nor liable to Costs by that Statute ibid.

6. All popular Actions on penal Statutes made before 21 *Jac.* 1. *c.* 4. must be brought and prosecuted in the proper County 373

Additions.

1. Addition of Place, &c. is not necessary in a Writ of *Homine Reple-*

4

giando on the Statute 1 *H.* 5. *c.* 5. Page 5, 6

2. Nor in any Case where Process of Outlawry lay not at Common Law 5

3. *Ergo* not in Replevin where such Process is only given by Statute 25 *E.* 3. *c.* 17. 2. ibid.

4. And the Statute 1 *H.* 5. touching Additions is to be construed strictly ibid.

5. *Ergo* it extends not to a *Novel Disseisin* (or other mixt Action) tho' the King shall have a Fine, and Exigent lies ibid.

6. And *Original Writ* in that Statute intends such Original as the Court proceeds on ibid.

7. *Ergo* not *Vicountiels*, as Replevins, &c. where the Proceedings are only on the *Pluries* ibid.

8. And where the Addition is not in the first Writ, if it be in the second or the *Pluries*, it vitiates the Writ 6

9. Any Matter that distinguishes the Persons makes the Addition of *Senior* and *Junior* unnecessary 7

10. As where there are two *A. Bs.* and the Writ is against *A. B. in Custod' Mar'*, 'tis well, except shewn that both are in *Custod' Mar'* ibid.

11. And where no such Addition is, the Father (or *Senior*) is *prima facie* intended ibid.

12. A Peer's eldest Son can't in legal Proceedings have the Addition of his Father's second Title, tho' such Addition is allowed him in common Parlance 451

Administrations, &c.

1. Who may grant Administrations. Every Ordinary and Peculiar may 40

2. And every Peculiar is an Ordinary for this Purpose: And see the Nature and Kinds of Peculiars 41

3. Admi-

The TABLE.

3. Administration originally belonged to the Bishop, and *Henslo's* Case in 9 Co. denied. Q. Page 37

4. It may be granted by the King, for he is Supreme Ordinary 41

5. Where granted by the Lord of a Manor, and how to declare thereupon *ibid.*

6. *Narr'* upon Administration granted *per Official' peculiar' &c. debito modo commissa*, is good *sans* Averment that he had Jurisdiction of Administrations 40

7. For where one grants Administration *virtute Officii*, the Plaintiff need not aver his Authority; *aliter* if by special Commission 41

8. So in *Narr'* by an Administrator, want of alledging by whom committed is cured by pleading *Non est factum*, or any Plea in Chief 37, 38

9. But ill on Demurrer, for it might be by a Peculiar; and then it must be averr'd, *cui Administrationis Commissio de Jure pertinuit, &c.* 38

10. To a *Narr'* on Administration committed *per Ep. L.* Plea that he was resident in another Diocese *tempore mortis*, is a good Bar 37

11. Where one has two Houses in divers Dioceses, it shall be granted by the Ordinary where he died (Q. if *Bon' notab'*) *ibid.*

12. Where *Bon' notab'* are in several Dioceses in the same Province, the Archbishop thereof must grant Administration 39

13. But where in one Diocese in one Province, and in another Diocese in another Province, each Bishop must grant it *ibid.*

14. Administration granted in *Dorset* gives no Title to administer a Judgment had in any Court in *Westminster* 40

15. Administration is void if granted by a wrong Ordinary, but voidable only if granted to a wrong Person 38

16. If the Intestate dies *sans* Kindred, the Property is in the Ordinary till Administration granted Page 37

17. And in that Case the Ordinary might dispose *in pios Usus*, except Letters Patent procured as usual *ibid.*

18. Where a Person dies intestate, the Ordinary shall commit Administration by Stat' 31 E. 3. c. 11. 41

19. Spiritual Court may grant Administration to which they will of Kindred in equal Degree 38

20. Or Part to one and Part to another: But of an intire Debt it must be to one only 36

21. Administration was granted to the *Grandmother*, and a *Mandamus* prayed to the Spiritual Court by the *Aunt*, but denied 38

22. Administration of the Wife's Goods must be granted to the Husband only 36

23. But of the Husband's Goods, it may be either to the Wife or next of Kin, &c. *ibid.*

24. A Man marrying a *Feme Executrix*, &c. the Administration is devolved on him; and he may bring *Assumpsit* on a Promise to himself without the Wife 117

25. Administration can't be granted where there is a Will and Executor, tho' the Will be concealed or the Executor refuse 301

26. Nor can it be granted tho' the Executor becomes Bankrupt, &c. *contra* if he becomes *Non compos* 36

27. Where it is committed to a Debtor the Action is only suspended (*Vide Executors*) 303

28. And if to an Obligor, tho' he has a Right to receive, and is to pay the Money himself, 'tis no Extinguishment 306

29. Also since the Statute 22 Car. 2. an Administrator is bound to account without Citation 315

30. And

The TABLE.

30. And one intituled to a Distribution by that Statute may sue an Administrator to prove his Account

Page 316

31. But a Creditor can't sue the Administration-Bond for Nonpayment of a Debt, for the Statute does not extend to it *ibid.*

32. Administration granted *durante Minoritate* of an Administrator ceases not till 21. But of an Executor it ceases at 17 39

33. Administration may be granted during the Absence of *B.* but the Declaration must aver that *B.* is absent 42

34. The Cause of Action accrues to the Administrator from the 'Time of Administration granted 421

35. For if *A.* receives the Interest Money, and afterwards Administration is granted to *B.* *B.* has six Years from the Administration granted to bring his Action (*contra* of an Executor *Vide* 21.) *ibid.*

36. Yet if he consents to the Defendant's retaining a Chattel before, he can't have Trover after Administration granted, *per 2 contra Holt* 295

37. If sued as Executor, he may plead he is Administrator, and need not traverse that he intermeddled before Administration granted 298, 317

38. But where sued as Administrator, if he pleads he is Executor, he must also traverse the dying Intestate 297

39. Where an Administrator is charged as Assignee, the Judgment is *De bonis propriis* 309

40. But where charged as Administrator, though he might have been charged as Assignee, 'tis only *De bonis Testatoris* 316

41. A Judgment against him as Executor may be pleaded in Bar to another Action brought against him as Administrator 296

42. On a Writ of Inquiry, after an Interlocutory Judgment reviv'd by *Sci' Fa'* on 8, 9 *W.* 3. the final Judgment must be against the Administrator and not the Intestate Page 42

43. Administrator under Letters Patent can't have *Cafe* for maliciously hindring him, by putting in *Caveats*, &c. 37

44. An Administrator impowers *A.* to receive the Intestate's Debts, but a Will appearing the Administration is repealed; the Executor may have *Assumpsit* against *A.* as for Money received to his Use 27

See also Executors.

Admiralty.

1. Mariners Wages due by Parol, are suable there, tho' the Contract on Land 31

2. *Aliter* if due by Deed or special Agreement *ibid.*

3. The Mate of a Ship may sue the Master thereof there for his Wages 33

4. But the Master can't sue there on his Contract with the Owners *ibid.*

5. So where an Executor of a Master sued there for the Master's Wages, a Prohibition was granted *ibid.*

6. For tho' Suit there for Mariners Wages is allowed by mere Indulgence, yet it never was for the Masters *ibid.* and 424

7. By their Law every Contract with the Master implies an Hypothecation of the Ship 34

8. But not so by the Common Law without an express Agreement *ibid.*

9. And the Master by their Law may Hypothecate the Goods as well as the Ship *ibid.*

10. And on such Hypothecation the Master is suable there, but not the Owners 35

11. The

The TABLE.

11. The Statute of Limitations is pleadable there to a Suit for Seamen's Wages Page 424

12. Where it has Jurisdiction their Sentences bind, and Common Law Courts must observe their Determinations 32, 33

13. Tho' the Admiralty Court deny a Copy of the Libel, yet no Prohibition till Appearance. *Contra* of the Spiritual Court 553

14. Prohibition can't be granted to try the Validity of their Process for Appearance, before Libel or Appearance 35

15. But if their Process be in Nature of an Execution, Prohibition may be before Appearance 31, 35

16. In a Suit there the Principal died before Sentence, and they proceeded on the Stipulation against the Sureties. *Quere* if a Prohibition may be 33

17. See before, in Actions of the Case. Case lies by the Owner of a Ship for arresting her by Admiralty-Process, &c. 31

See also *Master and Servant*, *post*.

Advowson, vide *Presentation*, and *Quare Impedit*.

Affidavits, vide *Oaths*.

Age.

1. The Minority of an Executor ceases at the Age of 17. But of an Administrator not till 39

2. The Age for making a Will to dispose of Goods, Chattels and Personal Estate, may be at 14 44

3. But Lands cannot be disposed of by Will till the Age of 21 44

4. Yet if one be born 3 Feb. at Eleven at Night, he may make his Will

of Lands at One in the Morning on the last of *January* in his 21st Year, because the last Day of his full Age is then begun Page 44

Agreement and Disagreement.

1. An Agreement may be either by Record or by Deed, or by Parol (*Vide Presentation*) 33

2. A Policy of Insurance altered by Agreement after it was underwritten, yet good 444

3. And in some Cases a Parol Agreement may avoid a Writing if made at the same Time 445

4. A Goldsmith's Note, or Bill of Exchange, not to be taken as Cash, except so expressly agreed by the Receiver 124, 442

5. See what Agreements are good on Parol Leases for Tithes, &c. 414, 657

See also *Bargain and Sale of Goods*.

Aiders, vide *Principal and Accessary*.

Alehouses.

1. To forfeit 10s. to the Poor if they permit any Inhabitant to sit Tippling above an Hour 45

2. Before 5, 6 Ed. 6. any Person might keep an Alehouse *sans* Licence, being a lawful Means of living *ibid.*

3. But if disorderly kept it was indictable as a Nuisance, and by that Statute two Justices (*Quor' unus*) may suppress it *ibid.*

4. And none are now to keep Alehouses unless licensed and Recognizance given *ut ibid.* ibid.

5. And if any does, he may be committed for three Days, and Bound with Sureties to appear at the Sessions *ibid.*

C

6. That

The TABLE.

6. That Statute does not extend to Inns being for entertaining Travelers, &c. unless they degenerate to Alehouses *Page 45*

7. But one that keeps an unlicensed Alehouse is not to be indicted, because punishable by the Statute otherwise *ibid.*

8. See there the Difference between suppressing a licensed and unlicensed Alehouse *45, 46*

9. The Sessions can't suppress an Alehouse licensed by two Justices *470, 471*

Aliens and Denizens.

1. Turks and Infidels are not *perpetui inimici* to us, &c. and Justice Brook's Opinion denied *46*

2. For tho' they differ from us in Religion, that does not oblige us to be Enemies to their Persons *ibid.*

3. They are the Creatures of God, of the same Species with us, and 'tis a Sin to hurt their Persons *ibid.*

4. If an Alien Enemy come hither *sub salvo Conductu*, he may maintain an Action *ibid.*

5. So may an Alien Amy that lives here under the King's Protection, tho' a War afterwards happen between the two Nations *ibid.*

6. So an Alien Enemy that lives here in Peace under Protection, may sue a Bond, &c. *ibid.*

7. For suing is but a consequential Right of Protection; *aliter* of one Commorant beyond Sea *ibid.*

8. Also, the Feme Covert of an Alien Enemy, she living here under Protection is chargeable as a Feme Sole *116*

Allegiance, vide Latos.

Amends, vide Tender, &c.

Amendment.

1. While the Declaration, &c. is in Paper, the Court may amend at Pleasure, because not within the Statutes of Amendments *Page 47, 520*

2. But when it comes to be in Parchment, the Court can mend no further than those Statutes allow, for 'tis then a Record *ibid.*

3. Stat' 14 E. 3. c. 6. and 8 H. 6. c. 12, 13. are the only Statutes of Amendments, the others are Statutes of Jeofails *551*

4. Declaration, &c. cannot be amended on Demurrer, after Entry on the Roll *50*

5. But on a Plea to the Right, or in Abatement, it may be reasonable to amend *ibid.*

6. Yet Declaration against J. G. Knt. on Plea in Abatement that he is Knt. and Bart. denied to be amended *ibid.*

7. A Judgment entered on the Plea-Roll was amended by the Paper Book signed by the Master *ibid. and 51*

8. Variance between the Writ of Error and the Record refused Amendment, tho' the Curstors Note was right *49*

9. For a Writ of Error is a Commission to the Judges, and the Court can't amend their own Commission *ibid.*

10. At Common Law no Difference as to Amendments between Civil and Criminal Cases, *contra per Stat' 47, 51*

11. A Writ of Covenant for a Fine, being an Original, is not amendable by Common Law or Statute *52, 53*

12. No Difference *quoad hoc* between Actions amicable and adversary, and 5 Co. 45 Gage's Case denied *53*

13. Variance between the Scire Fac. and the Judgment not amendable, &c. *Vide bis* *53*

14. Where

The TABLE.

14. Where the *Nisi prius* Roll may be amended by the Plea-Roll, and where not *Page 48, 49*

15. *Venire Ret'* 23 *Octob. Distrin-*
101 Tested 24. a Discontinuance, and not amendable *51*

16. In the *Distringas* the Day of *Nisi prius* was appointed after the Day in Bank, and after Verdict held not amendable by the Plea-Roll, because the Judges Authority was confined to that Day *48, 49*

17. Ejectment against seven, all join in the Common Rule, and the Issue was right in the Plea-Roll, &c. But the *Nisi prius* Roll was against five only, and after Verdict *pro Quer'* this amended by adding the two others *48*

18. A Demise in Ejectment laid 1697 for 96, not amendable after Verdict, because it would be another Title *ibid.*

19. A Verdict either general or special may be amended by the Clerk of Assizes Notes in Civil Cases, but not in Criminal *47, 53*

20. A special Verdict has been amended by the Notes of the Counsel in the Cause, and that after Error brought *47, 53*

21. An Information may be amended after Plea pleaded, and *per Holt* after the Record sealed up. *Q.* *47*

22. A Plea to Indictment of Murder amended after Replication and before Entry on the Roll *ibid.*

23. An Information of Forgery amended in ten Places (not material) without Costs or Imparlando *50*

24. If a Record in *B. R.* be amended by the Record in *C. B.* the Costs (if any) must be given below *49*

25. A *Distringas* with a Blank for *Debui, i. e.* the Cause of Action, amended after Verdict, as no *Distringas* *454*

26. For Want of a *Distringas* or no *Distringas* is aided by Verdict; *contra* of an ill *Distringas* *Page 454*

27. If the Plaintiff moves to amend his Declaration the same Term the Defendant's Plea comes in, he need not give new Rules to plead *50*

28. After a Plea to issue or Demurrer joined, while in Paper only, the Party may amend his Plea, or wave his Demurrer *ibid.*

29. See an Appeal amended by striking out of the Count *per Attornatum suum* *64*

30. After Judgment by Default, and Error brought, the Declaration was amended by the Warrant of *Attorn'* on the Top of the Roll *88*

Amerciaments, V. Fines & 54.

Amicus Curia, vid. 78, 447, 448.

Antient Demesne.

1. Tenants in Antient Demesne are free as to their Persons, but not their Estates *57*

2. The Privileges arise from the Constitution and Nature of the Thing coeval with the Government itself *ibid.*

3. They are supposed to commence by Act of Parliament; for they can't now be created by Grant *ibid.*

4. When triable by the Record of *Domesday-Book*, and when by the Country *ibid.*

5. Antient Demesne is Land under the Title of *Terra Regis* in that Book, and none other *ibid.*

6. Antient Demesne Lands held of a Manor in Antient Demesne, are only impleadable in the Lord's Court there *56*

7. But where Parcel of the Manor only is Antient Demesne, there the parti-

The TABLE.

particular Lands may be impleaded in the King's Court *Page 56*

8. By a Recovery at Common Law, Antient Demesne becomes Frank Fee, until reversed *Page 57*

9. Deceit lies for levying a Fine of Antient Demesne Lands *Page 210*

Annuity and Pension.

1. The King can't grant an Annuity to charge his Person, for his Person is not chargeable therewith, tho' a Subject is *Page 58*

2. But he may grant it out of his Excise or other Branch of his Revenue, which shall be charged therewith *ibid.*

3. A Pension out of an Appropriation, tho' by Prescription, is suable in the Spiritual Court *ibid.*

4. For it could not begin but by the Grant and Institution of Spiritual Persons *ibid.*

5. And whether granted by the Bishop's Ordinance, or by his Concurrence with the Patron, tho' Church itself is charged *ibid.*

6. Yet such Annuity, &c. can't be released to the Ordinary, because it is Temporal *ibid.*

Appeal.

1. The Plaintiff in Appeal of Murder, &c. must count in Person, and cannot by Attorney *Page 62, 64*

2. And if he be not present, he may be demanded and nonsuited *ibid.*

3. Yet such Nonsuit is not peremptory, because before Appearance *ibid.*

4. An Appeal is to be arraigned in French; but the Roll delivered in is to be in Latin *ibid. and 61*

5. But tho' it must be commenced in Person it may be prosecuted by Attorney, unless where Wager of Battail lies *Page 62*

6. And as the Plaintiff can't count, neither can the Defendant therein appear or plead by Attorney *Page 59*

7. *Nul tiel* Parish is a good Plea therein, but not pleadable by Attorney *ibid.*

8. The Parish may be named and not the Vill; for a Parish is not intended to contain more than one Vill. *(Q.) ibid.*

9. Erroneous Process therein is aided by the Defendant's Appearance and pleading to Issue *ibid.*

10. *Aliter* where he challenges the Defect by demurring in Abatement, &c. *ibid.*

11. And see *Numb. 1. ib.* That an Adjournment after a void Plea receiv'd discontinues the Appeal *ibid.*

12. What is sufficient Certainty in a Count on an Appeal *Page 60*

13. On an Appeal of Murder the Party may be bailed by B. R. tho' convicted of Manslaughter *Page 61, 62*

14. And on such Conviction may be allowed his Clergy, but shall not be discharged thereupon *Page 61*

15. For his Recognizance is to stand till he has discharged the Appeal by *Sci. Fa.* against the Appellant *ibid.*

16. And see there the proceeding on such *Sci. Fa.* and the arrainging of the Appeal thereon *de Novo ibid.*

17. Tho' the Appeal was put *sine die*, yet no Discontinuance, for the *Certiorari* continues it *Page 62*

18. Said, An Appeal either by Writ or Bill, is always arraigned on the Plea-Side, unless it comes in by *Certiorari*, and then on the Crown-Side *ibid.*

19. The Recognizance for Bail in Appeal may be either to the King, or Appellant, but best to the King *ibid.*

20. See the Manner of pleading the former Conviction, &c. on arrainging the Appeal *de Novo ibid.*

21. And that a Conviction of Manslaughter is a good Bar therein, tho' Clergy

The TABLE.

Clergy not had by Default of the Court Page 63

22. In a Writ of Appeal, Want of fifteen Days *inter the Teste & Ret'* cured by pleading in Chief *ibid.*

23. See the Case of an Infant suing an Appeal by Guardian, and the Under-Sheriff committed and fined for delivering the Writ to him 176, 177

Appearance.

1. Formerly, tho' a Writ was not return'd, yet the Defendant might appear at the Day, either to save a Penalty or his Inheritance 64

2. A Nonsuit before Appearance is not peremptory in Appeal, &c. *ibid.*

Appendant, vide Incident.

Apportionment and Division.

1. Where *A.* by Contract subjects himself to one Action only, it can't be divided so far as to subject him to two 65

2. *Ergo* Indorsee of Part of a Sum in a Bill of Exchange can't have Action for that Part *sans* shewing the other Part to be satisfied *ibid.*

3. So where the Contract is at first intire, it cannot afterwards be divided in an Action *ibid.*

4. As where the Contract is to pay 100*l.* *per Annum* for his Service, Action lies not for 3 Quarters *ibid.*

5. So of a Lease for Years at 20*l.* *per Ann'*, it lies not for any less Term than a Year *ibid.*

6. And so of other Contracts for Annuities, Wages, Debts, &c. the Contract can't be apportioned *ibid.*

7. But if in a Lease the *Habendum* be for Years, yet the Rent may be apportioned according to the *Reddendum*

141

Apprentices.

1. An Apprentice cannot be bound nor discharged without Deed *Page* 68

2. He is not assignable over (except by the Custom of *London* to one of the same Trade) 66, 68

3. Nor is the Master's Executor bound to provide for an Apprentice in Husbandry, on 5 *El.* 66

4. Yet the Executor is liable in Covenant, if he does not instruct an Apprentice or find him another Master 66, 68

5. Whatever the Apprentice gains belongs to a Master, and he may have an Action for it 68

6. A Covenant between the Master and a third Person, the Servant being no Party, makes no Apprenticeship 479

7. Service as Apprentice beyond Sea, qualifies one to use a Trade in *England* within 5 *El.* *Vide bis* 67

8. And following a Trade for seven Years is sufficient without any Binding, &c. and 5 *El.* a hard Law 613

9. Justices may compel a Master to take an Apprentice, &c. 67

10. Justices may discharge an Apprentice, and also order a Restitution of the Money given with him *ibid.* and 490

11. So the Sessions may discharge him by original Order there, and order the Money to be returned 68, 491

12. An Apprentice may gain a Settlement (tho' the Master has none) as an hired Servant, by 14 *Car.* 2. 533

13. An Order by four Justices for discharging an Apprentice, &c. good, tho' the Master does not appear 490

14. But their Power to discharge Apprentices extends only to such Trades as are named in the Statute 471, 490

15. And the Order of Discharge must be under the Hands and Seals of four Justices of Peace 470

D

16. But

The TABLE.

16. But in *Certiorari* to remove such Order the very Discharge need not be returned, but only the Substance thereof Page 470

See also *Indictments, Orders and Sessions.*

Arbitrament.

1. Where an Award creates a new Duty, the old is extinguished 69

2. But if it only ordains a Release to discharge the old Duty, 'tis otherwise *ibid.*

3. An Award may be good tho' no Time appointed for Performance, *per Holt*, for the Law supplies the Time *ibid.*

4. For whether it be to be on Request or Tender, or not, the Law says it shall be in convenient Time *ibid.*

5. An Award that the Party or his Executors shall release, &c. is good, for either may be used for Nonperformance *ibid.*

6. An Award that a Suit in *Chancery* shall be dismissed, is good 75

7. An Award that all Suits shall cease, is good and final; but an Award to be Nonsuit is not 74, 75

8. An Award may be good in Part and void in Part 74, 83

9. As an Award to make general Releases of all Demands to the Time of the Award is good for so much as goes to the Time of the Submission, and void for the Residue 74

10. An Award to pay the Costs of such a Suit is uncertain, *contra* if to pay such Costs as the Master shall tax 75

11. An Award that *A.* shall beg *B.*'s Pardon in such Manner and Place as *B.* shall appoint, is void 71

12. *Quare* if an Award of Money to be paid to a third Person be good, unless it appear to be for the Benefit of one of the Parties 74

13. An Award of a Collateral Thing in Satisfaction, held a good Plea without shewing Performance Page 76

14. Money paid on a void Award may be pleaded or taken as Accord with Satisfaction 71

15. An Award pleaded as made *de & super Præmissis*, is not enough, unless it appear to be so *in se* 70

16. *Quare* if an Award unperformed, tho' it gives a new Duty, can be a good Plea after Time of Performance elapsed 69

17. A Parol Award may be pleaded, ready to be deliver'd, &c. 75

18. If an Award be pleaded without Date, it must be computed from the Delivery 76

19. A Submission by *A.* as Attorney for *B.* concerning Accounts *inter B. and C.* good to bind *A.* but not *B.* 70

20. A Submission to an Award made a Rule of Court, tho' the Consent was only conditional 72

21. An Award made under a Rule of Court is *quasi* Part of the Rule 71

22. And on Breach of such Award, the Party may proceed both by Action and Attachment at the same Time 73

23. Service of a *Subpoena* held a Breach of a Rule of Reference made at *Nisi prius*, and Attachment granted, *Vide Attachment* 73

24. What a good Cause to set aside an Award made by Rule of Court, and what not 71

25. Appointment of an Umpire by Arbitrators before the Time expires for making their Award is void 70

26. Yet see where an *Umpirage* may be made before such Time is expired, or not 72

27. In what Cases such Appointment of an Umpire is revocable, or not 70

28. On

The TABLE.

28. On a Reference to three Foremen of the Jury, the Regularity of their Proceedings examined into *Page*

73, 84

29. In Debt on Bond to perform an Award, Omission in the Republication of a void Part of the Award, is no Variance; *aliter* if not void 72

See also *Attachment*.

Arrest of Judgment.

1. There are two Sorts of Matter for which Judgment may be arrested, *viz.* Intrinsic and Extrinsic 77

2. Intrinsic, when some Matter appears on the Record itself which renders the Judgment erroneous *ibid.*

3. Extrinsic, when some foreign Matter is suggested, which renders the Writ not only abatable but abated *ibid.*

4. The Difference between the old Method of Pleading and moving in Arrest, &c. 77, 78

5. And see *Numb. 4.* The Method at this Day of moving in Arrest, &c. 78

6. The Party has commonly four Days after the *Postea* brought in to move in Arrest 77

7. But if the *Distingas* be returnable within Term, so that there are not four Days between the Trial and the End of the Term, Judgment may be entred, if not arrested that Term *ibid.*

8. After a *Capiatur pro Fine* issued, no Arrest of Judgment 78

9. Judgment arrested because more Damages recovered than there ought 663

10. See the Entry of an Arrest of Judgment on a Prohibition, where a Verdict was for the Plaintiff 655

11. On Motion in Arrest and Rule to stay Judgment *quousque*, &c. and afterwards the Court being divided, no Judgment could be had 17

12. In *Assumpsit*, after Verdict, Judgment arrested because *nudum pactum* *Page* 364

13. See a Judgment arrested because more Damages given than there ought 663

See also *Judgments, Trials, and Verdicts.*

Arrest of the Body.

1. Arrest on *Sunday* is void, and the Party may have false Imprisonment 78

2. No Arrest can be without actually touching the Body 79

3. But if the Bailiff be prevented from touching, by the Party's offering to strike with a Weapon, 'tis an Assault *ibid.*

4. And if the Bailiff once touch him in the Arrest, he may pursue and break open the House to take him *ibid.*

5. Or he may have an Attachment, or return a Rescue against him *ibid.*

6. Where there are two Sheriffs the Arrest or Neglect of one is the Arrest or Neglect of both 152

See also *Escape*, and 274

Assault, vide Trespass and Arrest 3.

Assemblies unlawful, vide Riots, &c.

Assets.

1. If *A.* takes a Bond for another in Trust, and dies, this is not Assets in the Hands of *A.*'s Executors 79

2. So if the Obligee assigns over a Bond, and covenants not to revoke, and dies, this is not Assets in the Hands of the Obligee's Executor *ibid.*

3. If the Executor of Lessee for Years enter, &c. no Part of the Profits but what is above the Rent is Assets *ibid.*

4. For

The TABLE.

4. For the Rent is received by the Executor as Tertenant, and as appropriated to the Use of the Lessor

Page 79.

5. *Quere* the Distinction between Legal and Equitable Assets, and how either are liable

507

6. And how far Lands are liable to pay Debts as Assets

80

7. Outlawry upon Mesne Process does not make the Debt a Lien upon the Land.

ibid.

8. And bringing Debt upon a Judgment is no Waiver of the Lien created by the Judgment

ibid.

9. Where a Debtor pays the Testator's Debt to *A.* with Consent of Executor, 'tis Assets; *aliter* if without Consent

207

10. Unless the Executor brings Action, and recovers, and then 'tis Assets even before Execution

ibid.

See also *Executors* and *Legacies*.

Assignment.

1. Where the Lessor himself can't maintain Covenant, &c. his Assignee shall not

81

2. *Ergo* the Assignee of a Covenant can't sue in *England* for Rent reserv'd on Lands in *Ireland*, tho' payable in *London*

80, 81

3. The Assignee of a Reversion, tho' by Fine, can't have Covenant for the Rent, &c. without Attornment. *Q.*

82

4. But see now the Statute 4, 5 *Annae*, c. 16. for Amendment of the Law in this Particular

5. Lessee assigns to *A.* *A.* assigns to *B.* sans Notice to the Lessor, yet Lessor can't have Covenant against *A.* for Arrears incurred after the Assignment of *A.* *Q.*

81

6. And *Kighly's Case* in 1 *Sid.* 338. *Raym.* 162. 2 *Keb.* 260. denied

ibid.

I

7. But admitted he may have Covenant against *A.* for Rent due before Assignment

Page 338

See also *Covenant*

Assize.

1. The Writ in Assize may be returnable at any Common Day, or Return-Day; also the Assize may be adjourned

82

2. The Assize is to be arraigned in *French*, but can't be proceeded in before the Recognitors appear

ibid.

3. The Demandant nonsuited because not ready to count *instante* on the Tenant's Demand

ibid.

4. But such Nonsuit not peremptory; for the Demandant may have a new Assize

ibid.

5. If the Defendant in Assize plead in Abatement, he must plead over in Bar at the same Time

83

6. No Imparlance allowed therein without a good Cause, for it is *Fessinum remedium*

ibid.

7. And where several are Defendants it shall be taken by Default against such of 'em as do not appear the first Day

ibid.

Assumpsits, vide ante in *Actions on the Case*, &c. and *Breach*, &c. post.

Attachment.

1. In Cases of Awards, tho' not legally good, Attachment lies for Non-performance

83

2. *Aliter* if impossible, but the Party is excused only as to that Part which is impossible

74, 83

3. It lies not for not performing an Award (tho' made on a Rule of Court) without a personal Demand

83

4. On Award of three Foremen (tho' Verdict given for Security) Attachment for the Breach

73, 84

5. For

The TABLE.

5. For contemptuous Words of the Court, Attachment without a Rule to shew Cause *Page 84*

6. When one is taken on Attachment for such Contempt, &c. he enters into Recognizance to answer Interrogatories *ibid.*

7. On Rule to put off Trial on Payment of Costs, no Attachment for Nonpayment *83*

8. Attachment for a Rescue is never granted upon Affidavits only; but it must be returned on the Writ *586*

9. See an Attachment against a Judge of a Corporation Court, and what a Contempt is *201*

See also *Sheriff* and *Page 260*

Attainder.

1. Attainder of High Treason by Commission on 28 *H. 8. c. 15.* works Corruption of Blood *85*

2. But not Attainder of Piracy, or Treason, &c. before the Constable and Marshal, or Admiral *ibid.*

3. One attainted for counterfeiting the Coin on 8, 9 *W. 3.* forfeits Lands, but Corruption of Blood is saved *ibid.*

4. So that the Forfeiture and the Corruption are distinct Parts of the Penalty, and one may be, and the other not *ibid.*

5. In Attainders of Felony the Forfeiture to the Lord is only by way of Escheat *pro defectu Tenentis* *ibid.*

6. And the not descending is but the Consequence or Effect of such Incapacity *ibid.*

7. But in Treason the Lands come to the Crown as an immediate Forfeiture, and not as an Escheat *ibid.*

8. An Executor may bring Error to reverse the Attainder of the Testator *295*

See also *Treason.*

Attorney and Solicitor.

1. The Stat. 3 *Jac. 1. c. 7.* extends only to Attornies of the Courts at *Westminster*, and not to Attornies of inferior Courts *Page 86*

2. That Statute may be pleaded to Debt and *indebit' assump'* unless a special Promise laid, but then not, nor to an *Insimul Comp'* *ibid.*

3. An Attorney is not compellable to appear for any one, unless he takes his Fee or backs the Warrant *87*

4. Where an Attorney appears for any, the Court will not question his Authority, but leaves the Party to his Action *86*

5. Nor shall a Judgment be set aside for that he appeared without Warrant, if he be sufficient, *contra* if insufficient *88*

6. And his Consent to accept an Issue, &c. after Judgment sign'd, binds the Client, tho' contrary to his express Order *86*

7. Where an Attorney's Bill on Action brought by his Executor shall be referred to the Master or not, *vide* *89*

8. Where Writings come to his Hands as an Attorney, the Court will on Motion make a Rule to redeliver them *87*

9. But where they come to his Hands in any other Manner, the Party must resort to his Action *ibid.*

10. A Warrant of Attorney for the Plaintiff in the principal Action can't extend to the Suit against the Bail, but there must be a new Warrant *89*

11. A Judgment by Confession upon a Warrant of Attorney may be enter'd in the Vacation as of the Term precedent, tho' the Defendant died in the Vacation *87*

12. But a *post Terminum* Roll can't be filed without Leave of the Court *ibid.*

E

13. A

The TABLE.

13. A *Memorandum* was amended by the Warrant of Attorney on the same Roll Page 88

14. Till a Warrant be filed or entered 'tis not a Matter of Record, but one may appoint an Attorney in Court upon Record ibid.

15. See the antient Practice of entering Warrants of Attorney on a distinct Roll, and when altered ibid.

16. A *Remittit dampna* may be by Attorney, but a *Retraxit* must be *in propria persona* 89

17. An Attorney Defendant may have the Venue changed from any other County to *Middlesex* (*Vide Barrister*) 668

18. See an Attorney fined 515
See also *Abatement*, *Privilege*, *Rules of Court*, &c.

Attornment.

1. Lessor makes a second Lease, and before the first expires levies a Fine. Attornment by the first Lessee to the Conussee is sufficient 90

2. In pleading a Feoffment of a Manor, 'tis not necessary to shew the Attornment of the Tenants 91

3. Attornment is pleadable without a Venue, but triable only where the Land lies ibid.

4. Upon Issue *Non concessit*, Attornment need not be given in Evidence 90

5. Assignee of a Reversion though granted by Fine, could not have Action for Rent without Attornment 82

6. But this now remedied by the Statute 4 & 5 Ann. c. 16. for Amendment of the Law

Audita Querela.

1. This in itself is no *Supersedeas*, and therefore Execution may be taken

4

forth, unless a *Supersedeas* be actually sued Page 92

2. And if the *Audita Querela* be founded on a Deed, that must be proved in Court before a *Supersedeas* shall be granted ibid.

3. If an *Audita Querela* be founded on a Record, or the Party be in Custody, the Process upon it is a *Sci' Fa'* ibid.

4. But if grounded on a Matter of Fact, or the Party not in Custody, the Process is a *Venire* and Distress infinite ibid.

5. Where the Party is in Execution, he may either have a *Sci' Fa'* or *Venire* ibid.

6. Where two *Nichils* are return'd the Court will relieve on Motion without an *Audita Querela* 93

7. A. on Judgment against him renders himself, but never gives Notice to the Plaintiff, nor gets the Bail discharged, and the Plaintiff on *Sci' Fa'* gets Judgment against the Bail, the Court would not relieve them on Motion, but put them to their *Audita Querela* 101

8. One taken in Execution on an *Audita Querela* may be bailed 105
See also Page 264

Averments.

1. Where Promises are mutual, Performance or Tender, &c. must be averr'd 112, 172

2. So where one Thing is to be done as the Consideration of the other in Contracts, &c. 113, 171

3. Where and in what Cases Considerations in *Assumpsits* must be averr'd, *vide* 23, 24, 25, 29

4. Where the Replication must conclude to the Country, and where with an Averment 174

5. Where Jointenancy is pleaded in Abatement, the Life of the other Jointenant not named must be averr'd 32
6. On

The TABLE.

6. On Administration granted to *A.* during the Absence of *B.* the Narr' must aver that *B.* is absent *Page* 42
 7. Where an Award is pleaded to be made before the Day, *Ready to be delivered* need not be averr'd 69
 8. A Parol Award may be pleaded with Averment of *Ready to be delivered, &c.* 75
 9. Where Uses may be averr'd by Parol or not, *vide* 676
 10. No Averment can be admitted of a Trust to superstitious Uses by the Statute of Frauds 162
 11. Any Matter out of a Deed that alters the Case can't be averr'd 197
 12. Nor is any Averment to be receiv'd against the exprefs Words of a Deed or Will 227
 13. Where a Matter is averr'd to be within the Jurisdiction, the Defendant must plead to the Jurisdiction, or else is estopped 202
 14. See of Averments in Indictments on 5 *Eliz.* that it was a Trade at the Time of the Act 611
 15. Where Uses may be averr'd *vide* 676, 678
- See also *Declarations, Estoppel, and Pleadings.*

Avowry, vide Replevin.

Authority.

1. It is essential to a Deputy to have the same Power with his Principal 95
2. And a Covenant or Condition to restrain such Power is void 96
3. And he may do all Acts that his Principal could, except making a Deputy *ibid.*
4. But tho' he can't make a Deputy as to his whole Power, yet he may empower him to do particular Acts *ibid.*
5. As a Deputy-Steward of a Court-Baron may empower another

to hold a Court, take Surrenders, &c.

Page 96, 97

6. And such Under Deputy may either Act in his own Name, or else reciting his Authority, act in the Name of the Deputy or Principal 97
 7. Except an Under Sheriff, who must act in the High Sheriff's Name, because the Writs are so directed, &c. *ibid.*
 8. The Acts of a Steward *de facto* are sufficient among Tenants of a Manor *ibid.*
 9. Authority given by Letter of Attorney may be either general or special *ibid.*
 10. And tho' particular Authorities cannot be varied from in Matter of Substance *ibid.* and 658
 11. Yet if only a Variance in Circumstance it may be good 97
 12. Principal Officer answerable both for himself and Deputy 118, 19
 13. Yet the Deputy is also chargeable as a Wrong-doer *ibid.*
 14. Where an Authority is given to Justices of Peace it must be exactly pursued 475
 15. See other Kinds of Authorities 363, 419, 442, 454, 467, &c.
- See also *Power.*

Award, vide Arbitrament.

B

Bail in Civil Cases.

1. SEE the Rules of Practice about putting in Bail and excepting thereto 98
2. In Debt on Bond, tho' the Defendant says it was usurious, or *per duress*, it shall not excuse from special Bail 100
3. Special Bail in *Indebit' Assump'*, so for Money won at Play, *per Holt* *ibid.*
4. But

The T A B L E.

4. But not in Debt on Bond to perform Covenants, yet with respect to the Breaches and the Damage thereby (the Measure of which shall be taken from the Plaintiff's Oath) it may *Page 100*

5. In *B. R.* if the Sum recovered exceed the Sum in the *Ac etiam Bille*, the Bail is not liable *102*

6. On Removal by *Habeas Corpus* special Bail must be given in here, except in Cases of Executors 98, 101, *102*

7. But on such Removal the Court will examine the Cause of Action, and take Bail accordingly *ibid.*

8. And on Removal out of an inferior Court, the Plaintiff is bound to accept the Bail below, except in *London* *97*

9. For the Sufficiency of Bail in *London* is at the Peril of the Clerk who is responsible, and the Plaintiff can't except there *ibid.*

10. Yet in Debt against Executor on a Judgment suggesting a *Devastavit*, he shall give Bail; for there the Action is in the *Debet & Detinet* *98*

11. And on Removal by *Habeas Corpus* where special Bail was below, he shall give Bail to appear within two Terms, but not to pay the Condemnation *ibid.*

12. On Error in Parliament of a Judgment affirmed in *B. R.* new Bail is required *97*

13. For the first Bail does not extend to Costs assess'd in the House of Lords, therefore a new Recognizance is to be *ibid.*

14. One charged in Custody of the Sheriffs of *L.* was discharged on common Bail for want of proceeding in two Terms, by 4, 5 *W. 3* *98, 99*

15. In an Action on a Replevin-Bond common Bail shall be admitted *99*

16. The Merits of the Case not to be examined into upon Bailing (*vide supra, 7.*) *Page 99, 100*

17. If the Sheriff takes insufficient Bail for Appearance, and the Plaintiff refuse it, he is liable to an Action and may be also amerced *99*

18. The Sheriff may take Bail-Bond on Attachment for Contempt, but the Prosecutor may refuse to accept it *608*

19. But if in either Case the Plaintiff take an Assignment of the Bail-Bond (tho' insufficient) the Court will not amerce *99*

20. *A.* recovers in three Actions where were three Bails, the Defendant render'd himself, and one of the Bails enter'd an *Exoneratur* on the Bail-Piece; this does not discharge the rest till *Exoneratur* enter'd for them also *98*

21. So *A.* on Judgment against him renders himself, but gives the Plaintiff no Notice, nor discharges the Bail-Piece; and the Plaintiff on *Sci' Fa'* gets Judgment against the Bail, and the Court would not relieve because no *Exoneratur* entered *101*

22. Tho' a Render before Return of the *Latitat* is not pleadable to an Action on a Recognizance of Bail *ibid.*

23. Yet the Court *ex Officio* allowed it on the *Latitat*, as well as on a *Sci' Fa'*, and denied the Case of *Miles* and *Bateman*, 3 *Keb.* *ibid.*

24. And note, Render in Discharge of Bail in an Action will not discharge the Bail on an Indictment *105*

Bail in Criminal Cases.

1. One committed for Treason or Felony is to enter his Prayer on the *Habeas Corpus* Act, to be tried the first Week of the Term or Day of Sessions after his Commitment *103*

2. But if an Act suspends the Power of Bailing for a Time, there he need not

The TABLE.

not enter his Prayer till the first Week in Term or Day of Sessions after the Expiration of such Act *Page* 103

3. Yet Lord *Aylesbury* was bailed tho' no Prayer entred in Time, because long imprisoned, Trial delayed, and Life in Danger 104

4. One committed for aiding an Escape of *D.* committed for Treason, was bailed for Default of Prosecution 103

5. One indicted of Murder ought not to be bailed upon Affidavits of the Evidence 104

6. But one found guilty of Murder by the Coroner's Inquest only is bailable, *contra* if indicted *ibid.*

7. One indicted of Murder and found guilty of Manslaughter, not bailable before Clergy had 103

8. Yet *Lisle*, who was indicted of Murder and found guilty of Manslaughter, was bailed before Clergy had *ibid.*

9. So in Appeal of Murder and found guilty of Manslaughter, one was bailed before Clergy. *Q.* 61, 62

10. *M.* committed for forging Indorsements on Bank Bills, bailed, on a *Habeas Corpus*, because only a great Misdemeanor 104

11. But upon Error of a Conviction for a forcible Detainer, the Defendant was refused to be bailed 106

12. Because in Execution for the Fine, *i.e.* 100 *l.* tho' the long Vacation coming on *ibid.*

13. Yet one taken on *Excom' Cap'* is bailable, while the *Ret'* of the *Habeas Corpus* is under Consideration 105

14. See there the Manner of the Entry of such Bail, and Condition of the Recognizance *ibid.*

15. But Bailing during Consideration (as 13.) is discretionary, and the Court will refuse it if he pleads a false Plea 106

Bailiff.

1. A Corporation aggregate may appoint a Bailiff to distrain without Deed *Page* 191

2. In Replevin, if the Defendant makes Conusance, or justifies as Bailiff to *J. S.* a Traverse of the Command of *J. S.* is sufficient 107

3. So in Trespafs for taking Cattle or Goods, for in those Cases, though *J. S.* may have a Right to take the Cattle, &c. yet a Stranger can't justify the Taking but by his Command, &c. *ibid.*

4. But *aliter* in Trespafs *quare Clausum fregit*; for there, tho' the Defendant justifies as Bailiff, or by Command of *J. S.* the Plaintiff shall not traverse the Command, because it would admit the Truth of all the rest of the Plea *ibid.*

5. In Trespafs on a Justification as Bailiff to a Court Leet for levying an Amercement, some Estreat of the Court or Warrant of the Steward must be shewn *ibid.*

6. *Note*, in Replevin the Bailiff is an Actor, and shall recover upon the Merits 108

7. But in Trespafs the Bailiff is only to excuse the Wrong, and recovers nothing *ibid.*

Bakers, vide *Weights and Measures.*

Bankrupts.

1. An Innkeeper held not within any of the Statutes about Bankrupts, tho' also a Part-owner of a Ship 109

2. So a Buying and Selling under a particular Restraint is not within the Statute 110

The TABLE.

3. But an *English* Subject trading from Foreign Parts may be a Bankrupt

Page 110

4. If a Defendant renders himself in Discharge of Bail, and lies two Months, he is a Bankrupt from the Arrest

111

5. Yet adjudg'd tho' lying in Prison upon Arrest makes a Bankrupt, 'tis otherwise if he puts in Bail

110

6. Outlawry, after an Act of Bankruptcy committed, shall not defeat the Interest the Creditors have acquired in his Estate

108

7. Yet a Purchaser after shall not be impeached by a Commission sued five Years after the Bankruptcy

109

8. A plain Act of Bankruptcy can't be purged by dealing afterwards; *aliter* if doubtful only

110

9. An Assignee has Property by Relation from the Time of the Bankruptcy, so as to avoid all Mesne Acts

111

10. See the Judges Resolutions on the Stat' 4 & 5 *Ann.* against Frauds committed by Bankrupts

111, 112

11. A Mortgagor or Purchaser precedent, tho' by a defective Conveyance, to be preferr'd before the Assignees of Bankruptcy

449

Bargain and Sale of Goods.

1. Earnest only binds the Bargain, and gives the Byer a Right to demand the Goods

113

2. But notwithstanding Earnest, the Money is to be paid on fetching away the Goods; and a Demand *sans* Payment is void

ibid.

3. And if the Buyer does not come to pay, the Seller ought to go and request him, and then if he does not pay, &c. in convenient Time, the Agreement is dissolved

ibid.

4. Where one Thing is to be the Consideration of the other, tho' there be mutual Promises, Performance must be averr'd

112

5. As if I sell you my Horse upon your paying me 10 *l.* I can't have the Money without a Delivery or Tender of the Horse, nor you my Horse without averring Payment or Tender and Refusal of the Money

Page 113

6. So where mutual Promises are to transfer Stock on Payment of so much Money

112

7. But *aliter* where a Time is limited for the Performance on one Part

113, 171, 172

8. If *A.* and *B.* come to a Shop, and *A.* says to the Seller, let *B.* have such and such Goods, and I will see you paid, &c. the Law intends *A.* to be the Buyer, and *B.* to act but as *A.*'s Servant

23, 28

Barons, vide Peers.

Baron and Feme.

1. Action against a Feme Covert allow'd good, her Husband being Alien Enemy and in *France*: For a Divorce shall be intended

116

2. The Husband held liable to the Wife's Contract as a separate Trader, &c. because they cohabited, *per Holt*

113

3. Wife can't charge her Husband after notorious Separation, though by Consent and separate Allowance

116

4. Nor is he bound by her Contracts, or liable even for Necessaries, after a notorious Elopement, unless he take her again

116, 119

5. But if he turns her away he gives her Credit for Necessaries wherever she goes, *per Holt*

118

6. And while they cohabit he shall answer her Contracts, &c. for by cohabiting his Assent is presumed, *per eundem*

ibid.

7. *Contra* where the Husband expressly disassents beforehand, by Notice to

to

The TABLE.

- to the Owner or his Servant, *per eundem* Page 118
8. If she takes up Materials, as Silks, &c. and pawns them before made into Clothes, he is not liable; for they never came to his Use. *Contra* if made up and worn, *per eundem* *ibid.*
9. Action lies not on a Promise of Marriage, except the Contract is mutual, for otherwise it was only *Nudum Pactum* 24
10. A Contract of Marriage *per verba de presenti* is a Marriage *de facto* 437, 438
11. And whether *per verba de presenti* or *de futuro* is cognizable in the Spiritual Court, and their Sentence is binding 437
12. Yet held that Marriage by a mere Layman was void, and a Cohabitation thereupon did not intitle the Man to Administration of the Woman's Goods 119
13. For on his demanding a Right due to Husbands by the Ecclesiastical Law, he must prove himself a Husband by the same Law 120
14. *Quere* in Case of such Husband's Death, if it shall intitle the Feme and Issue to a Distribution *ibid.*
15. Note the Form of pleading a Marriage is, That it was *per Presbyterum sacris Ordinibus Constitut'* *ibid.*
16. Yet in Debt by Baron and Feme *Nunques accomple*, &c. is no Plea for a Marriage *de facto* is sufficient 437
17. Nor can the Spiritual Court annul a Marriage after the Parties are dead, because they proceed *pro salute Anima* 121
18. Yet Evidence at Common Law was admitted to Bastardize a Peer, even after the Death of himself and Parents (*darum*) 120, 121
19. The Husband may release Costs adjudged to the Wife in the Spiritual Court, unless a Separation be, and Alimony allowed 115
20. He alone must bring the Action for Work done by her during Coverture, unless an express Promise be made to her Page 114
21. And the Advantage of such Work shall not survive to her, but go to the Husband's Executors *ibid.*
22. But Money earned by her living separate shall go towards her own Maintenance 118
23. Trover by Baron and Feme, *ad dampnum* of both, held naught after Verdict; for the Possession and Property of the Wife is vested in the Husband 114
24. But Trespass by him for Imprisonment of the Wife, *per quod Negotia viri infecta reman'* *ad damp'* of both, held well after Verdict 119
25. For Matter may be alledg'd in Aggravation of Damages, for which no Action will lie *ibid.*
26. Husband of a Feme Executrix gives a new Day to the Testator's Debtor, who then makes a new Promise, &c. he may bring *Assumpsit* thereon without joining the Wife 117
27. But if he dies before Recovery she is restored to her former Right, for the Duty was not extinguished by the new Promise *ibid.*
28. A *Sci' Fa'* by Baron and Feme on a Judgment recovered by her while Sole, if after Execution awarded she dies, it survives to the Husband 116
29. In an Action against Baron and Feme he shall give Bail for Appearance both for him and his Wife 115
30. But where one brings an Action against the Husband only, he can't declare against him and his Wife *ibid.*
31. In an Action against both for a Battery by the Wife while he was in Prison, a Declaration can't be deliver'd at the Prison against him & *Ux'*, but Process must be sued against the Wife, and she arrested 114
32. The

The TABLE.

32. The Wife may justify an Assault
in Defence of her Husband Page 407

437

33. Husband and Wife covenant
to levy a Fine of the Wife's Land to
the Use of the Heirs of the Body of
the Husband on the Wife begotten, is
void 675

34. *A.* marries *B.* living a former
Wife, and receives her Rents, &c. *B.*
may have *Indeb' Assump'* as for Mo-
ney receiv'd to her Use, the Husband
having no Right to receive it, &c. 28

35. A Covenant before Marriage
to release the Wife's Guardian after,
set aside in Equity 158

36. If *Baron* and *Feme* declare on
Indeb' Assump' to them as Executors
on a Nonsuit, they shall pay Costs 207

37. A Warrant, &c. by a *Feme Sole*
is revoked by her Marriage after 399

Barretry, vide Usury.

Barristers at Law.

1. If a Defendant be a Barrister or
Attorney, &c. attending the Court, he
may have the Venue changed to *Mid-*
dlesex from any other County 668

2. Also a Trial at Bar is seldom
denied to any Gentleman at the Bar
or Officer of the Court 651

Bastard.

1. The Rule that none shall be
Bastardized after his Death holds only
in Case of *Barstard eigne* and *Mulier*
puisne (vide *Baron* and *Feme* 17, 18)

120, 121

2. But the Spiritual Court can't an-
nul a Marriage, or bastardize Issue
after the Party's Death 548

3. A Child begotten after a Di-
vorce a *Mensa & Thoro* only shall be
taken to be a Bastard 123

4. *Aliter* after a voluntary Separation,
unless found that the Husband
had no Access 123

5. So if the Husband be beyond Sea
during the whole Time of her going
with Child, 'tis a Bastard Page 122, 534

6. *Contra* if he were here at all
during that Time, for then Access
would be presumed 122

7. A Bastard Child is generally to
be settled where it is born 485

8. But if born in *B.* pending an il-
legal Order for removing the Mother
thither, 'tis no Settlement there 121

474, 532

9. Nor does the Justices Order for
Maintenance determine the Bastard's
Settlement 123

10. Money may be ordered to be
paid to the Overseers for Maintenance
of a Bastard Child 122

11. Justices may order Payment of
a Sum in gross for that Purpose 124

12. Order to pay so much *per Week*
till it be fourteen Years old, is ill 121

478

13. Order for Maintenance quash'd
because the Words of Adjudication
were in the Singular Number for the
Plural 122

14. An Order of Bastardy under
the Hands of more than two Justices
is good, if one of them be of the
Quorum 477

15. From an Order of Bastardy the
Appeal must be to the next Quarter-
Sessions 482

16. *Viz.* To the next (Quarter)
Sessions after Notice to the reputed
Father of the first Order 480

17. On Motion to quash an Order
of Bastardy, the reputed Father must
be present in Court 475

18. By 28 *El. c. 3.* Sessions must
proceed on the reputed Father's Re-
cognizance 122

19. But by 3 *Car. 1. c.* they may
commit him, &c. *ibid.*

20. Stat. 13, 14 *Car. 2. c. 12. sect. 21.*
relates to the Maintenance of poor
Children not Bastards 123

Bills

The TABLE.

Bill of Exceptions, vide Trial.

Bills of Exchange.

1. At Common Law the Drawer was not chargeable unless he had Notice of the Drawee's Non-payment in convenient Time Page 127
2. And convenient Time is to be guided according to the Usage of Traders and particular Circumstances of Cases 133
3. Yet where *A.* indorses and delivers a Bill to *B.* who keeps it by him long after payable, if not paid he may have *Assumpsit* against *A.* (*vide infra*, 19) 124
4. And the Indorsement, Delivery and Detainer is no Evidence that *B.* accepted it as so much Money, unless paid *ibid.*
5. Nor shall a Bill so received, &c. go in Discharge of a precedent Debt, except made Part of the Contract *ibid.*
6. As where *A.* sells Goods to *B.* and agrees to take a Bill on *C.* in Satisfaction, there *A.* is discharged tho' it be never paid *ibid. vide* 442
7. A general *Indeb' Assump'* will not lie on a Bill of Exchange for want of a Consideration (as Value received, &c.) 125
8. But a special *Indeb' Assump'* must be against the Drawer, or a special Action of the Case on the Custom of Merchants *ibid.*
9. And drawing of a Bill makes a Merchant to support the Custom in that Case *ibid.* and 445
10. A Bill payable to *A. or Bearer* is not assignable to charge the Drawer, *contra* if to *A. or Order* 125
11. But such Indorsement charges the Indorfor, for the Indorsement is in Nature of a new Bill *ibid.*
12. Trover for a Bill payable to *A. or Bearer*, will lie against the Finder, &c. but not against the Assignee 130

13. The Words, *or to his Order*, in a Bill gives Authority to assign it by Indorsement, &c. Page 133
14. And the Assigning of a Bill, Note, &c. not payable *to Order*, charges the Indorfor, but not the Drawer *ibid.*
15. A Blank Indorsement on a Bill does not transfer the Property without some further Act 126, 130
16. But such Indorsement may be filled up by the Indorsee so as to charge the Indorfor 128
17. And so, tho' the Bill be purchased at Discount, &c. And so may an Acquittance, &c. *ibid.*
18. Indorsee of Part of a Sum in a Bill, can't bring an Action *sans* shewing the other Part satisfied 65
19. *A.* indorses two Notes in Satisfaction of a Debt, but before Receipt the Drawer broke. *Quare* if the Indorfor could be charged (*vide supra*, 3. 132
20. An Indorfor by Custom is only liable in Default of the first Drawer 130, 132
21. Yet said, The Indorfor charges himself in the same Manner as if he were the Drawer 133
22. See what is necessary to be proved to charge the Indorfor, in an Action by the Indorsee 128
23. Action lay not on a promissory Note before the Statute, and it can't be laid within the Custom of Merchants, *vide bis* 129
24. On a Promise (after Day of Payment) to pay *secundum Tenor' Billæ*, Action lies 127, 129
25. So Acceptance after Day of Payment is good, and amounts to a Promise to pay generally 129
26. Acceptance by one, where the Bill is drawn on two, binds both, if it concerns their Joint Trade 126
27. A Declaration against the Drawer is good *sans* laying an express Promise G

The TABLE.

mise, for by the Drawing 'tis implied

Page 182

28. In Declaration on a first Bill, Want of averring the second and third not paid is aided after Verdict 129

29. In Declaration on a Foreign Bill, drawn at two Usances, the Time of which it consists must be averr'd 131

30. In Declaration on Inland Bills against the Drawer, a Protest need not be set forth, nor necessary at Common Law *ibid.*

31. See the Form of a Bill of Exchange between two Persons only 130

32. An *Assumpsit* on a promissory Note on the Custom of Merchants, held ill, 24, 129

33. And Goldsmiths Notes are only a conditional Payment without an express Consent 442

Bonds, vide Obligations.

Bishops, Archbishops, &c.

1. The Archbishop has a Metropolitcal Jurisdiction over Bishops by the Common Law 135

2. Which was usurped by the Pope, but restored by the Statutes of Henry the 8th *ibid.*

3. A Bishop may be punished in the Archbishop's Court for any Offence against the Duty of his Office 134

4. A Bishop cited before the Archbishop in Person for Simony, &c. *ibid.*

5. Archbishop or Bishop may judge in Person or by their Vicar General *ibid.*

6. Their Courts may punish a Temporal Offence if committed in an Ecclesiastical Matter, or Face of the Court *ibid.*

7. All Bishops are Co-ordinate or *Pares Jure Divino*, but not *Jure humano* 135

8. He that can visit can also deprive (Q.) *ibid.*

4

9. On Issue whether a Parson be deprived, the Court writes to the Bishop *Page 135*

10. But on Issue whether a Bishop be deprived, it writes to the Archbishop *ibid.*

11. Antiently Bishopricks were donative by the King, and conferred by Investiture 136

12. Translation of Bishops antiently was by Postulation to the Pope 137

13. See the Manor of Creating and Translating a Bishop at this Day 136

14. Four Things requisite to compleat a Bishop, Election, Confirmation, Consecration and Installation 137

15. Note his former Preferments are void by his Consecration and Confirmation not by his Election 136

16. A Bishop's Lease, if it exceed the Statute, is void *in toto* as to the Successor 189

17. See the Bishop's Power to compel a Sequestration 320, 321

See also *Administrator* and *Presentations*.

Breach in Covenant, Debt, Case, &c.

1. *A. and B. Dimiserunt* imports a joint Covenant as to the Interest granted 137

2. But it may be several with respect to subsequent Acts 138

3. In Covenant where a Plaintiff assigns several Breaches the Defendant may traverse them severally *ibid.*

4. In Covenant, Breach that 3l. for a Year at *Lady-Day* last was arrear, &c. held well on general Demurrer 139

5. Covenant not to buy or sell within two Years, Breach that *diversis Diebus & Vicibus* between such a Day and such a Day he sold to *H.* and several others, held well after Verdict *ibid.*

6. The

The TABLE.

6. The Heir assigns a Breach that the Premises were out of Repair *tali Die & per 10 Annos ante*, which included his Ancestor's Time, yet held well Page 141

7. Agreement to convey to *H.* or his Assigns, Breach that he did not convey to *H.* (only) is good 139

8. See the Diversity between Covenant to do an Act, to one or Assigns, and by one or Assigns *ibid.*

9. In Debt and Bond (except to perform an Award) where a Defendant pleads Matter of Excuse that admits a Nonperformance, the Plaintiff need not assign a Breach in his Replication 138

10. And see and note the Difference of Bonds to perform Awards from all others, and the Reason thereof *ibid.*

11. Also in Debt on Bond to perform Covenants, the Replication must shew a certain Breach; but in Action of Covenant 'tis enough to assign a general Breach 140

12. *Assumpsit* to deliver Corn on or before the 5th of *January* into a Barge, to be brought by the Plaintiff. Breach, That he did not deliver upon the 5th of *January*, is good *ibid.*

13. In a Lease, if special Days of Payment are limited by the *Redden-dum*, the Rent must be computed by that, and not the *Habendum* 141

See also *Condition, Covenant*, 4, 5

Bridges, vide Highways.

Buildings, vide Houses.

By-Laws.

1. A Franchise granted, or Corporation erected, may be regulated by By-Laws, tho' no such Power express'd in their Charter 142

2. Members are compellable to undergo Offices, &c. imposed by a By-

Law, even in Cases where they may be indicted Page 142

3. He that is represented must take Notice of the Acts of the Body representative *ibid.*

4. A By-Law, That all Strangers shall imply City-Porters, is ill 143

5. But a By-Law, That none but Freemen shall be City-Porters seems good. *Q. ibid.*

6. For the Freemen are represented by the Livery-Men, and bound by their Acts and By-Laws 142

7. *Note*, Wager of Law does not lie in Debt for Breach of a By-Law 682, 683 684

See also *Corporations* and *London.*

C

Canon-Law, vide Laws.

Capias Utlagatum, V. Outlawry.

Carrier.

1. **H**E is liable in respect of his Reward, and not of the Hundred's being answerable over to him 143

2. For the Hundred is made liable by Statute, but he was so at Common Law *ibid.*

3. And the being robbed does not excuse him, because it may be by such Combination and Consent as cannot be proved *ibid.*

4. *A.* undertaking to carry Goods of all Persons indifferently for Hire, is a common Carrier, &c. 249, 250

5. In what Cases Trover will lie against him or not, *vide* 655

6. And where the Master of a Stage-Coach is liable for Goods lost by the Driver, *vide* 282

Certiorari

The TABLE.

Certiorari, Recordari.

1. Where the *Certiorari* is to remove Orders, the *Fiat* only is sign'd by the Judge Page 150
2. But where it is to remove Indictments, both the *Writ* and the *Fiat* must be signed by him ibid.
3. A *Certiorari* generally lies to all inferior Jurisdictions, as the Court of *Ely*, and all Franchises, &c. 148, 149
4. So it lies to the Justices of Peace in *Wales*, and Counties Palatine, and Commissioners of Sewers, &c. 145, 146
5. But not granted to the *Old Baily*, nor to any Justices of Gaol-Delivery unless for special Cause 144, 150, 151
6. A *Certiorari* is like a *Recordari*, which removes all Things pending at any Time between the *Teste* and *Return* 149
7. And it is a *Supersedeas* to the Proceedings *infra*, for the same Reason that a *Habeas Corpus* is 148
8. But for removing Indictments, &c. it is not to be allowed without Bail; *vide* the late Act 149
9. Nor is it to be served after the Jury are sworn 144
10. Nor is it a *Supersedeas* to an Execution begun before the *Certiorari* issued 147
11. It ought to be to remove both the Indictment and Conviction, where the Defendant is convicted 150
12. But 'tis not proper after Conviction, unless where Error lies not, or a Fine is to be set in *B. R.* 149
13. It lies on a Judgment given by the Censors of the College of Physicians for male Practice, because Error does not lie 144
14. But a *Certiorari* to remove a Conviction of Recusancy was denied 145
15. Exceptions are usually taken to Orders of Sewers removed by *Certiorari* before they are filed Page 145
16. Note; The whole Body of Commissioners of Sewers were laid by the Heels for refusing to obey a *Certiorari* ibid.
17. Where it issued to remove a Conviction of Deer-stealing, the Return was quash'd, being imperfect 146
18. On Removal of a Conviction for not paying the Duty on Cyder, the Return in *English* was allowed 149
19. After *Certiorari* to remove Inquisition of forcible Detainer, the Justices can't award Restitution 151
20. A *Certiorari* to remove an Indictment against *A.* will not remove one against *A.* and *B.* 146
21. So if to remove all Orders against *A.* and *B.* omitting (or either of them) it will not remove an Order against *A.* only 151
22. So if to remove an Order touching *Foreign Salt*, where the Order is touching *Salt*, omitting *Foreign*, 'tis not removed 145
23. Also the Name of the Parish in the Writ and that in the Order removed must appear to be the same 252
24. For there ought to be no Variance between the Writ and the Order removed 145, 146, 151
25. Also the Order itself must be returned *in hac verba*, and not with *cujus quidem Tenor sequitur*, &c. 147, 493
26. And the Return must be made by the Justices (to whom the Writ is directed) and not by the Clerk of the Peace 470
27. Note; Orders of Justices are not to be removed before the Time of Appeal expired 147

See also *Error*, *Habeas Corpus*, and *Sessions*.
Challenge

The TABLE.

Challenge.

1. On a Challenge to a Juror for Favour, two of the Jury were sworn as Triers. See their Oath. *Page* 152
2. Where two Persons are Sheriffs, and one is challenged, the *Venire* shall be directed to the other *ibid.*
3. So where two Coroners are, if one be challenged the other must act *ibid.*
4. A Juror may be challenged in Criminal Cases, if one of those that found the Bill of Indictment 153, 634
5. So if the Prisoner can prove by others that he said he was Guilty or would be hang'd, &c. 153
6. So a Juror may on a *Voire dire* be ask'd whether he hath any Interest in the Cause, &c. *ibid.*
7. And in a Civil Cause, whether he has given his Opinion beforehand upon the Right, &c. *ibid.*
8. But he can't be examin'd to any Matter Criminal or Infamous to himself in order to a Challenge *ibid.*
9. 'Tis a good Challenge to a Juror, that he hath been a Juror before in the same Cause 648

Chancery.

1. In Equity, Land agreed to be sold shall go as Money; and Money agreed to be laid out in Land, as Land 154
2. Land settled in Trust to pay Debts is discharged as soon as the Money is rais'd, tho' misapply'd by the Trustees 153
3. Where Lands are devised to pay Debts, even Debts barr'd by Statute of Limitations shall be paid there-with 154
4. For they remain Debts in Equity, and the Statute has not extin-

guish'd the Duty tho' it takes away the Remedy at Law *Page* 154

5. A Trustee buying in Debts for less than is due, shall not be allowed for the whole; *aliter* of one purchasing in his own Right *ibid.*

6. A Term created for a special Purpose, after that is determined is attendant on the Inheritance *ibid.*

7. Remainder of a Term limited to Daughters after a Limitation in Tail, if the Estate-Tail was contingent and never took Effect, the Daughters shall take, otherwise not 156, 157

8. A Term limited in Remainder after the Father's Death in Trust for raising Daughters Portions at Age or Marriage: When either happens, the Portions are to be raised in the Father's Life-time 159

9. So where limited to take Effect in Case the Father dies without Issue Male by his then Wife, and she dies without such Issue in his Life-time, the Portions are to be then raised *ibid.*

10. But in no Case shall the Portions be raised before the Contingency on which 'tis founded 160

11. A Bond given to refund Part of the Portion without the Father's (Husband's) Privity is void 156

12. So a Covenant before Marriage to release the Wife's Guardian of all Mesne Profits set aside within two Days after 158

13. Lands were devised to J. S. paying the Heir 20000*l.* within twenty Years by 1000*l.* *per Annum.* The Heir entred for Nonpayment as a Forfeiture, and the Devisee relieved 156

14. For wherever Equity can give Satisfaction for Breach of a Condition they can relieve against a Forfeiture *ibid.*

15. And that for every 1000*l.* not paid, the Heir or Legatee shall have Interest from the Time 'twas payable *ibid.*

H

16. And

The TABLE.

16. And no Deduction for any Taxes, because it is not to issue or arise out of the Lands, but 1000*l.* per *Annum* is given as a Sum in Gross
Page 156

17. A Legacy is generally to be taken as a free Gift, and not as a Payment of a Debt 155, 508

18. A Legacy to a Creditor greater or less than his Debt, how to be taken
ibid.

19. Payment of Interest to a Scrivener on a Mortgage is good, if he has the Bond or Mortgage-Deed 157

20. And so is Payment of the Principal on a Bond, if he deliver up the Bond
ibid.

21. But 'tis otherwise of a Mortgage, for there he has Authority only to receive the Interest
ibid.

22. And if the Mortgagee agree 'tis good during his Life, tho' the Scrivener has neither the Bond nor Deed
ibid.

23. And so 'tis after his Death if the Executor agrees either expressly or by Implication
ibid.

24. A Mortgage does not revoke a Will *in toto*, but severs the Jointenancy of the Trust of a Term 158

25. That a Jointenancy is an odious Thing in Equity
ibid.

26. Merchants Goods in the Hands of a Factor not liable to Debts of a superior Nature 160

27. Otherwise of Money in the Factor's Hands 161

28. Executor must pay Debts of a higher Nature after a Decree *quod Computet*, not after a final 507

29. Injunction against pulling down a Castle granted against Tenant for Life dispunishable for Waste 161

30. Bill there to foreclose a Mortgage admitted, tho' the Lands lay out of the Jurisdiction of the Court 404

31. *Non-Performance* of a Condition precedent to the taking of an Estate not relievable there; *aliter* if forfeited

I

231, 232

32. Chancery *agit in personam*, tho' Lands be *extra Jurisdictionem* Page 404

See also *Charitable Uses*, *Devifes*, *Mortgages*, *Trusts*, &c.

Chaplain.

1. The King's Chaplain Extraordinary not capable of a Plurality within 21 *H. 8. c. 13, 14* 161

2. A Dispensation is not necessary where the King presents his Chaplain to a second Benefice
ibid.

3. A Chaplain Extraordinary has no waiting Time, &c. but only his Name enter'd in the Book of Chaplains 162

4. A Chaplain within 21 *H. 8.* must be retained under Seal, &c.
ibid.

And see *Parson*, *Vicar* and *Curate*.

Charitable Uses, &c.

1. To a Bill for Charitable Uses all the Tertenants need not be made Parties 163

2. Devise of Lands to Charitable Uses not in Writing, or not having three Witnesses is void
ibid.

3. And the Statute 43 *El.* which favour'd Appointment to Charities, is repealed *pro tanto* by the Statute of Frauds
ibid.

4. Devise to superstitious Uses is void, but neither the King nor the Heir shall have it
ibid.

5. But the King may apply it to a proper Use, *i. e.* as a Charitable Devise
ibid.

6. No Averment can be admitted of a superstitious Use by the Statute of Frauds 162

7. But Devifes in Trust for superstitious Uses are discoverable by Informations in the *Exchequer*
ibid.

8. The Statute of Frauds did not bind the King as to Appointment of superstitious Uses, &c. 162, 163

Churches

The TABLE.

Churches, Chapels, Church-Wardens, &c.

1. One that only occupies Lands in a Parish is taxable in a Rate for Bells, &c. Page 164
2. Inhabitants of a Chapelry are liable to Repairs of the Mother-Church, unless exempt by Custom 164, 165
3. *Aliter* where it is a late Erection in Ease and Favour of those of the Chapelry 165
4. By the Common Law the Parishioners are to repair the Church, but by Canon Law the Parson 164
5. The Parishioners are bound to repair the Church, but the Chancel is to be by the Parson *ibid.*
6. But in *London* the Parishioners repair both Church and Chancel, tho' the Freehold is in the Parson 165
7. Church-Rates are to be assess'd by the Parishioners, and not by the Church-Wardens (*Vid. Faresl. 69.*) *ibid.*
8. Union of Churches was at Common Law, *i. e.* by Concurrence of the Parson, Patron and Ordinary *ibid.*
9. But Union of Parishes is by Statute, *vide Stat' 22 Car. 2. c. 11.* &c. *ibid.*
10. By Union of Churches the ancient Church or Rectory, and the Incumbency seems to be extinct *ibid.*
11. Intire Neglect of going to Church is punishable in the Spiritual Court 166
12. But *quere* if one is suable there for not going to his own Parish-Church *ibid.*
13. Return to a *Mandamus* for swearing in a Church-Warden being insufficient, a peremptory *Mandamus* was granted *ibid.*
14. Parishioners cannot prescribe to dispose of Pews exclusive of the Ordinary 167

Church of England, Religion, Dissenters, &c.

1. On Information for refusing to take on him the Office of Sheriff, adjudg'd, Dissenters are not exempted by the Toleration from doing what is necessary to qualify themselves for Publick Offices Page 167
 2. *Ergo* not exempted from taking the Oaths and Sacrament according to 13 *Car. 2. &c.* *ibid.*
 3. For the King has an Interest in the Persons of his Subjects, and a Right to demand their Service 168
 4. And none can be exempted from the Office of Sheriff unless by Statute or by Charter *ibid.*
 5. The Toleration Act is a private Statute, and not taken Notice of by the Court unless pleaded *ibid.* & 574
 6. A License to a Dissenting Minister inrolled in one County does not extend to another 572, 673
- Clerks of Assize, the Peace, &c. vide Offices.*
- Collation and Lapse, vide Advowson, Bishops, Presentation, &c.*
- Commission, vide Authority.*
- Commitment, vide Attachment, and Habeas Corpus.*
- Common.*
1. A Farmer is to be taxed for Common appendant in the Parish where the Farm lies 169
 2. One may prescribe for Common appendant to his Cottage *ibid.*
 3. How a Copyholder shall make Title to Common within or without the Manor 170
 4. Where it is out of the Manor, tho' he infranchise his Copyhold the Common remains 171
 5. But

The TABLE.

5. But where within the Manor, it belongs to his Estate, and Infranchisement extinguishes the Common (Q.)

Page 171, 366

Common Recovery, vide *Recovery*.

Common Informer, vide *Indictments*, &c.

Computation, vide *Age*, *Day* and *Term-Time*.

Condition.

1. A Condition made impossible by the Act of God can't be broken 170

2. See the Nature and Effect of a Condition precedent 171, 231

3. An Agreement that *A.* shall do, and for the doing *B.* shall pay, the latter is a Condition precedent *ibid.*

4. But where a Time is fixed for the Payment, it will vary the Construction 113, 171

5. A Release of all Demands will not release a Promise unbroken, or a future Act 171

6. A Condition is to be construed as an Agreement according to the Intent of the Parties 113, 171, 172

7. Where a Condition is underwritten or indorsed, if it be void the Obligation remains single 172

8. But where it is incorporated, and made one with the *Lien* itself, if it be impossible the whole is void *ibid.*

9. Condition to exhibit an Inventory into the Spiritual Court before such a Day, the Defendant in Excuse must not only plead that no Court was held, but also that he was there ready *ibid.*

10. Where a Condition is precedent to the taking of an Estate, *Non-performance* differs from a Forfeiture thereof in Equity 231, 232

See also *Obligation*.

I

Confession.

1. A Verdict for the Plaintiff set aside, and Judgment entred by Confession on the Matter of the Plea

Page 173

2. After a frivolous Plea Judgment may be entred as by Confession, *aliter* if only mispleaded *ibid.*

Confirmation.

A new Charter may be used as a new Grant, or as a Confirmation 168

Conquest, vide *Law*.

Consent, vide *Agreement*.

Consideration, vide *Assumpsit*, and p. 422.

Conspiracy.

1. A Conspiracy, though nothing done in Pursuance of it, is an Offence, and that whether it be to charge one with an Offence Temporal or Spiritual 174

2. And the bare meeting and consulting to charge falsely an innocent Person is indictable *ibid.*

3. And in the Indictment it need not be averr'd that the Party is innocent, for to charge falsely is *tantamount* *ibid.*

4. The *Venue* therein must be where the Conspiracy was, and not where put in Execution *ibid.*

5. And Confederacies, &c. are one of the Articles to be inquir'd in the Commission of *Oyer and Terminer* *ibid.*

Constable and Marshal, vide *Marshal*.

Constables.

The TABLE.

Constables.

1. The High Constable was an Officer at Common Law before the Stat. of *Winion*, as well as the Petty Constable Page 175, 581
2. And are Officers to the Justices of Peace as the Sheriff is to the Court of *B. R. (Q)* *ibid.*
3. Both High and Petty Constables are removeable, and the Justices in Sessions are the best Judges of that Matter 150
4. A Constable chosen at the Leet is bound to serve under a Penalty 175
5. But such Penalty can't be distraint'd for, *jans* express Custom *ibid.*
6. Regularly he is to be chosen in the Leet or Turn, but may be in a Corporation by Custom 502
7. Sessions of the Peace may appoint a Constable *ibid.*
8. The Constable of *A.* takes an Oath (on Sale of a Distress) in *B.* and held well 247
9. If a Warrant be directed to a Constable by his Name, he may execute it out of his Precinct 176
10. He is indictable for neglecting his Duty required either by Common Law or Statute 380

Construction of Words, &c. vid.
Exposition.

Consultation, vide *Prohibition.*

Contempt, vide *Attachment*,
Page 429.

Contracts, vid. *Agreement, Bargain and Sale, Breach, &c.*

Continuance and Discontinuance.

1. A wrong Conclusion of Prayer of Judgment in a Replication makes a Discontinuance Page 177
2. If a Plea to the Whole answers but to Part, the whole Plea is naught, and the Plaintiff may demur *ibid.*
3. But if a Plea to Part answers only to Part, 'tis a Discontinuance, and the Plaintiff must take Judgment for the rest 94, 177
4. And where the Plea is only to Part, if the Plaintiff don't take Judgment for the rest, it makes a Discontinuance 180
5. See where Issue is joined to Part, and Demurrer to the Residue, after divers Continuances a Discontinuance recorded *ibid.*
6. The Plaintiff can't discontinue after a Rule for Judgment for the Defendant 179
7. Yet a Discontinuance may be by Leave of the Court after a Special Verdict, not after General 178
8. Statute 32 *H. 8. c. 30.* extends to all Discontinuances, as well of Court as Process, both in inferior and superior Courts 177
9. Continuances are not entered in *B. R.* till the Plea-Roll is made up (*Vide 420*) 179
10. Outlawry of the Plaintiff between Action brought and Plea pleaded, need not be pleaded *puis darrein Continuance* 178
11. The Plea *puis darrein Continuance* is a Waiver of the Plea in Bar *ibid.*
12. A *Venire* returnable 23 *October*, and the *Distringas* tested the 24th, is Discontinuance 51
13. If a Defendant makes a Discontinuance by his Demurrer, the Plaintiff may either take Judgment or join in Demurrer 4

The TABLE.

14. A Demurrer in Bar to a Plea in Abatement makes a Discontinuance Page 104, 218

15. So does a Demurrer to a Demurrer (Q.) 219

16. Several Bars may be pleaded to several Parcels of a Debt on Bond 180

17. Of Discontinuances in Replevin, *vide* 3, 93, 94

What may be laid with a *Continuando*, *vide* Nuisance and Trespass.

See also Amendment, Departure, Feofails, Pleas, &c.

Convictions.

1. A Summons is necessary in all summary Convictions 181

2. Where the Time therein is impossible it is no Summons *ibid.*

3. In Convictions on 43 *El.* for cutting Trees in the Night, their Nature and Number must be shewn *ibid.*

4. A Plea of Title to such Conviction shall not be receiv'd, *per 3 contra Holt* and *St. John's Case*, 5 *Co.* denied 182

5. On Conviction of Deer-stealing each Offender forfeits 30 *l.* the Statute being *respectively forfeit* *ibid.*

6. In Convictions before Justices what appears upon Evidence will not supply a Defect in the Charge 385, 686

7. 'Tis the Conviction of a Crime, and not the Punishment, that makes the Infamy 689, 690

8. On Conviction of *Forcible Detainer* the Defendant refus'd to be bail'd 106

See also *Indictments*.

Conuzance of Pleas.

1. See the Manner of demanding Conuzance of Pleas, and the Method of Entry thereof 148, 183

2. An immemorial Usage ought to be shewn, and then an Allowance in *B. R.* or *Eyre* 184

4

3. And the Record of such Allowance must be produced Page 184

4. In Ejectment for Lands in the Isle of *Ely*, after *Non culp'* pleaded, a Suggestion of Conuzance was entered on the Roll without any *Nient dedire* or Confession of the other Party, yet held well 183

See also *Courts inferior*, *Franchises*, &c.

Coparceners, *vide* *Jointenants*.

Copyholds and Copyholder.

1. A Writ of Right lies not of Copyhold Lands 186

2. Steward of a Copyhold Manor may take Surrenders out of the Manor 184

3. Surrenderee of a Copyhold is within the Equity of the Statute 32 *H. 8. c. 3.* 185

4. An Admittance relates to a Surrender, and the Surrenderee's Title begins from thence *ibid.*

5. Equity ought only to supply a Surrender against the Heir in Favour of a Son or Daughter, &c. 187

6. Causes of Forfeiture of Copyhold Lands do not descend to the Heir 186

7. Tenant for Years makes a Feoffment, 'tis a Forfeiture; not so where he makes a Lease for a longer Term 187

8. Copyhold Lands are *Parcel Manerii*, Freehold Lands are held *ut de Manerio*. *Nota.* 186

9. Custom in a Manor to grant Lands by Copy to two or three for their Lives, *Habend' successive*, &c. a Grant to *A. Habend'* to him for the Lives of *A. B.* and *C.* is warranted by the Custom 188

10. If a Copyhold Tenant *pur autre vie*, die, the Lord shall enter, and there is no Occupancy *ibid.*

11. For

The TABLE.

11. For Occupancy is only to supply a Freehold Page 189

12. Also Rent to *A. pur auter vie* ceases by *A.*'s Death *ibid.*

13. The Act of a Copyholder can't alter his Estate in Prejudice of the Lord *ibid.*

14. Copyholds are included within an Exception of Demeans of the Manor 573

Coroner.

1. Where there is but one Sheriff, and he challenged for Favour, the *Venire*, &c. must go to the Coroners 152

2. But if two Sheriffs are, and but one only challenged, it must issue to the other Sheriff *ibid.*

3. So if two Coroners are, and one is challenged, the other must act *ibid.*

4. If a Coroner's Inquest be quash'd he must make a new one, *super visum Corporis* 190

5. But if a *Melius Inquirendum* be on a *Male se gessit* of the Coroner, the Inquiry must be before the Sheriff, or Commissioners upon Affidavits; for none but the Coroner can inquire *super visum Corporis* *ibid.*

6. He may cause the Body to be dug up soon after the Burial, but not a long Time after 377

7. See a Coroner's Inquest quash'd because the Wound not set forth, nor that the Party died of it *ibid.*

See also *Indictments*.

Corporation.

1. Elections, &c. to be made originally by the Body at large, may by Usage and By-Laws be restrain'd to a select Number 190

Also the Election may be in one Body, and Approbation in another 436

2. The Surrender of a Charter of Incorporation is void without Inrolment 191

3. Where Members under a good old Charter join with Members under a new bad one, their Acts are void Page 191

4. A Corporation must have a Name either express'd in the Grant or implied in the Nature of the Thing *ibid.*

5. They may do an Act upon Record without their Common Seal, but not in *Pais* 192

6. At Common Law no Officer was bound to sign a Return *ibid.*

7. They may make a Fraternity, and also By-Laws to bind Strangers, for publick Convenience *ibid.*

8. See the Difference between a Corporation and a Fraternity 193

9. They may sue by their Name of Incorporation, notwithstanding an express Power to sue by another 434, 451

10. A Corporation aggregate may appoint a Bailiff to distrain, &c. without Deed 191, 467

See also *By-Laws*, *Customs*, *Franchises*, *London* and *Mandamus*.

Costs.

1. Full Costs are allowed in Trespas where done *clamando titulum*, or the Freehold be in Question 193

2. The King pays Costs for Amendments but not for going on to Trial *ib.*

3. But where there is a Prosecutor he shall pay it in both Cases *ibid.*

4. No Costs are allow'd on Demurrers to Pleas in Abatement to either Plaintiff or Defendant 194

5. Information against three, and one only acquitted, he shall not have Costs on 4, 5 *W. & M. c.* 18 *ibid.*

6. Costs taxed upon a *Certiorari*, are to be only the Costs in *B. R.* 55

7. Prosecutor can't move to aggravate the Fine after his Accepting Costs *ibid.*

8. See

The TABLE.

8. See an Exposition of the Rule for putting off Trial upon Payment of Costs Page 11

9. *Note*; Issues are never estreated by special Rule, unless in extraordinary Cases 55

10. See exemplary Issues ordered to be return'd against the *E. I. Company* 191

See also *Damages*, and *Fines* and *Amerciaments*.

Cottages and Inmates.

1. See the Description of a Cottage, Curtilage, Messuage, &c. 169

2. And that the Stat' *De Extenta Manerii* says a Cottage contains a Curtilage, &c. ibid.

3. The Ordinance *de Terris Mensurandis* is an Act of Parliament 195

Covenant.

1. *A.* lets a House excepting two Rooms, and is disturbed therein, Covenant lies not 196

2. *Aliter* if excepting a Passage thereto, and he be disturbed in that ibid.

3. Where a Bond or Covenant to indemnify is made before the first Condition, 'tis forfeited by the Breach 197

4. *Aliter* if given afterwards, or to indemnify against a single Bill ibid.

5. Assignee is not liable to a Breach incurr'd before Assignment 199

6. Tho' Covenant may be brought on a Deed-Poll, yet none can bring it unless named in the Deed 197

7. Covenant to discharge from Taxes tends only to subsequent Taxes of the same Nature, not of different Natures 198

8. Grantee of a Rent-Charge can't bring Covenant against Assignee of the same Land ibid.

9. Diversity where a Covenant is avoided by subsequent Statute, and where not Page 198

10. Where a Conveyance of Land is void, so as no Estate passes, all dependant Covenants are void also 199

11. *Aliter* of Independant Covenants ibid.

12. That a Covenant to repair runs with the Lands, and the Reason thereof vide 317

13. What Words will make a Covenant joint or several 393

14. See the Case of a Mortgagee's covenanting that the Mortgagor shall quietly enjoy till Default of Payment, &c. 245

See also *Assignment* and *Breach*.

Counties Palatine, vide *Palatine Counties*.

Courts, and Inferior Jurisdictions.

1. Power to examine, hear and punish is a Judicial Power 200

2. A Court that has Power to fine or imprison is a Court of Record ibid.

3. All Misdemeanors of Judicial Officers are Contempts of *B. R.* 201

4. See the Proceedings and Process of inferior Courts, and of punishing Jurors there ibid.

5. See an Attachment against a Judge of a Corporation-Court for granting a new Trial 201, 650

6. In a Presentment in a Court-Leet, 'tis not necessary to shew how nor *quo Jure* the Court is held 200

7. Where the Jurisdiction of a Court is limited in Things, and they hold Plea of other Matters, all is void 202

8. *Aliter* where limited to Persons. For there if the Defendant does not plead to it, he is estopp'd 201

9. So

The TABLE.

9. So where a Matter is averr'd to be within the Jurisdiction, if the Defendant does not plead to the Jurisdiction he is estopped Page 202

10. An Officer executing Process of Inferior Courts is justified though the Cause be out of the Jurisdiction, except it appears to be so 201

11. A Judgment of a superior Court is only voidable, but of an Inferior Court if they exceed 'tis void 674

12. Nonew Trial in Inferior Courts 650

See also *Jurisdiction, Marshal, Universities.*

Customs.

1. A Custom tho' apparently subsequent to another may be also laid Time out of Mind; for Customs are not coeval 293

2. A Custom that none shall Trade in a Town besides Persons free of the *Gilda Mercatoria* there. *Q.* If good in any except *London* 203

3. See the Difference as to such a Custom between *London* and other Cities 204

4. Antiently the King's Grant to have *Gildam Mercatoriam* made the Town a Corporation ibid.

5. This Action ought to have been brought by the Guild or Corporation ibid.

6. See the Difference between general Customs whercof the Law takes Notice, and special Customs which must be pleaded, *vide* 184, 243

7. For Customs of Copyhold Manors, *vide Copyhold*

See also *By-Laws, Corporation, London and Universities.*

Custos Rotulorum, vide Offices, &c.

D

Damages.

1. Statutes that give Costs are to be taken strictly Page 205

2. By 2 *W. M. ff.* 1. c. 5. The Plaintiff shall recover treble Costs as well as treble Damages ibid.

3. Where a Statute gives a Penalty to the Party grieved he shall have Costs; *contra* if to the Informer 206

4. In Case for Slander with special Damage, the Plaintiff shall have full Costs; tho' the Damages under 40 s. ibid.

5. The Court are bound by the Clause in 21 *Fac. c.* 16. for increasing Costs, but the Jury not 207

6. In Trespafs for taking, driving and wounding his Sheep, the Plaintiff shall have full Costs 208

7. See the Construction of 22, 23 *Car. 2. c. 9.* of certifying for Costs 206, 208

8. Upon a Recognizance of Bail no Damages can be given *occasione dilationis Executionis* 208

9. Husband and Wife declare upon an *Indeb' Assump'* to them as Executors, on Nonsuit they shall pay Costs 207

10. Upon a Nonsuit in Replevin for a Distress for a Poors Rate, if the Jury omit to inquire of Damages, it may be supplied by Writ afterwards 205

11. Trespafs for entring an House and assaulting, &c. the Assault, &c. may be laid by Way of Aggravation of Damages 642

See also *Costs.*

Day, Date, and Delivery.

1. The Day of the Delivery of a Deed is the Day of the Date, tho' there is no Date set forth 76

K

2. If

The T A B L E.

2. If a Deed bear Date one Day, and be delivered another, it was really dated when delivered Page 76

3. But as to the Clause *geren' Dat' &c.* it seems otherwise, and differs from a *Datu* or *cujus Dat' &c.* *ibid.* Et vide p. 463

4. If an Award be pleaded without Date, it must be computed from the Delivery 76

5. An impossible Date is no Date, and a Plaintiff must declare of the Time of making, &c. 463

6. A Lease to Commence a *Datu* includes the Day of the Date, per 3 contra Treby 413

7. A Deed dated in Figures without *Anno Domini*, &c. good, &c. 658

8. Lessor dying on the Day the Rent became payable (*i. e.* before Sun-set) it shall go to the Heir, not the Executor 57

9. Insurance of *A's* Life for a Year, *A.* dies on the last Day thereof, the Insurer is liable 625

See also *Age* and *Term-Time*, &c.

Debt.

1. Debt lies for Sheriff's Fees of executing an *Elegit* 209

2. It lies in the *Marshalsea* on a Judgment had in *B. R.* *ibid.*

3. In Debt for Rent on a Lease at Will Occupation must be shewn *ibid.*

4. In all Cases where Debt lies an *Indebitatus Assumpsit* will lie, *sed non econtra* 23

5. Where the same Hand is to receive that ought to pay, is an Extinguishment of the Debt, *vide* 305

Deceit.

1. It lies on Warranty of a Horse to be found that wants an Eye, &c. 210

2. Where the Seller has the Possession of Chattels, the bare affirming them to be his makes a Warranty Page 210

3. *Aliter* where he has not Possession, for there is room to question his Title, and *Caveat Eemptor* 211

4. But such Affirmance is no Warranty in Sale of Lands, whether the Seller be in or out of Possession *ibid.*

5. Deceit lies for affirming to a Purchaser that the Rent is more than it is *ibid.*

6. Deceit for a Fine levied of Ancient Demeasne lies against the Heirs of the Conuzor and Conuzee after five Years, because it was merely void 210

Declaration, p. 22.

1. See the Diversity between charging a Prisoner with the Declaration in *Term-Time* and in the Vacation 213, 214

2. In Case for maliciously holding to Bail, the Declaration is to recite the Sum due and the Process specially, &c. 15

3. In *Consideratione inde super se assumpsit*, not saying the Defendant *Assumpsit*, held well after Verdict 26

4. Mistakes in a Declaration can't be taken Advantage of on a Plea in Abatement 212

5. In *Narr'* by Administrator, want of alledging by whom committed cured by pleading *Non est factum* 37

6. On Administration granted during the Absence of *J. S.* the *Narr'* must aver that *J. S.* is absent 42

7. Declaration for keeping a Bull used to run at Men, is naught after Verdict, without *sciens* or *scienter* 662

8. On the Statute of Hue and Cry, the Declaration need not set forth the Oath to be taken before a Justice of Peace of the Hundred 614

9. Declara-

The TABLE.

9. Declaration concluded *contra formam Statuti* well, tho' some of the Matters are not within the Statute Page 212
 10. Two Counts in a Narr' for Things of the same Kind not averr'd to be different, well after Verdict 213
 11. What Declarations are cured by Verdict, *vide Verdicts* and 364
 12. Declarations in *Quare Impedit* upon Agreement by Indenture between Jointenants to present by Turnis 43
 13. Declarations on Bills of Exchange, *vide* 128, 131
 14. How to declare on a Bond dated beyond Sea 660
 15. See the Difference of declaring on Words spoken and Words written 661
 16. How to declare in *Indeb' Assump'* for a Negro sold 666
 17. How to declare in *Trespass Vi & Armis*, *vide* 636
 18. A Declaration in Ejectment must shew the Quantity of each Sort of Land 254
 19. Where the Count shall abate for Repugnancy 213
 20. See a Declaration on Copyhold Land, not said *ad voluntatem Domini* held well after Verdict 364
- See also *Recognizances*, 1 and 2.

Deeds and Charters.

1. Where a Deed runs in the first Person, signing and sealing makes A. a Party tho' not named therein 214
2. Where one is bound by Deed to do an Act, of which he is to give Notice, tho' the Notice is dispensed with by becoming impossible, yet the Act must be done *ibid.*
3. Upon *Non est factum* found against a Deed it may be kept in Court, *aliter* if on a collateral Issue 215

4. Where the Deed or Writing is only produced as Evidence, and the Action not founded on it, the Defendant can't have a Copy Page 215
 5. An Obligation deliver'd by A. to C. to the Use of B. is a Deed till B. refuses 301
- See also *Obligations, Oyer and Releases.*

Deer-stealing, *vide Convictions, Indictments and Principal.*

Default.

1. Where a Defendant makes Default at *Nisi prius*, no Judgment can be given for him, nor Repleader awarded 216
2. In personal Actions the first Default before, and the second after Issue join'd is peremptory *ibid.*
3. Where upon Default after Issue join'd the Inquest shall be taken by Default, and where Judgment may be given *ibid.* & 217
4. But in Appeal of Rape, if after Issue join'd the Defendant makes Default, there shall be neither 217
5. Default may be waved in real Actions, not in Personal *ibid.*
6. The Day of *Nisi prius* not being the same with the Day in Bank, a Default at *Nisi prius* can't be waved at the Day in Bank *ibid.*

Defeasance, *vide Releases.*

Defence.

A Plea without Defence may be refused, but is made good by Acceptance 217

See also *Pleas, &c.*

Demand, &c. *vide Request.*

Demurrer.

The TABLE.

Demurrer.

1. Demurrer to a Declaration in Trover *de duobus fulcris*, &c. Plaintiff may release Damages as to that
Page 218
2. Demurrer in Bar to a Plea in Abatement is a Discontinuance 218,
220. *Vide* 93, 94
3. But Issue being join'd on another Promise, the Demurrer was stayed and may be cured by Verdict 218
4. Demurrer to a Demurrer makes a Discontinuance (*sed Q.*) 219
5. A Demurrer for Duplicity must shew wherein *ibid.*
6. A Demurrer may be to Part, and Issue to the other Part 218, 219
7. No Demurrer can be in Abatement, and if there be, the Court will give final Judgment 220
8. If a Defendant makes a Discontinuance by his Demurrer, the Plaintiff may either take Judgment or join in Demurrer 4
9. See Judgments on Demurrers

402, 403

See also *Estoppel*, *Pleas*, &c.

Denizens, vide *Aliens*.

Deodands.

1. Where several Things move *ad Mortem*, they are all *Deodands* 220
2. As where a Cart overturned and threw a Person from it before the Wheels of a Waggon which ran over the Man, and kill'd him, both the Cart and the Waggon and all the Horses of both are *Deodands* *ibid.*
3. So if a Tree fall on the Branch of another Tree which breaks and kills a Man, both are forfeited *ibid.*
4. So if a Horse throws a Man in a River which carries him down to

4

a Mill where he is kill'd with the Wheel
Page 220

Departure.

1. In Trespass to a Justification by Distress, if the Plaintiff replies an Abuse, 'tis no Departure 221
2. So in Trespass, if the Defendant justifies on the Day in the Narr', the Plaintiff may alledge another Day in his Replication 222
3. And so he may in *Assumpsit*; For the Time is but Circumstance, and if the Defendant force him to vary 'tis no Departure 223
4. Nor is a varying from that which is not materially alledg'd any Departure 222
5. But where Performance is pleaded, and Matter of Excuse is afterwards set forth in the Rejoinder, 'tis a Departure 221

Deputy, vide *Authority*.

Detinue.

1. An Action of *Detinue* will lie for Goods forfeited, see the Reason 223
2. *Detinue* of Charters no Plea in Dower after Imparlanee 252
See also *Actions in General*.

Devastavit, vide *Executor*.

Devise.

1. No Construction or Implication to be admitted against the express Words of a Devise 226, 227
2. And where a particular Estate is expressly devis'd, a contrary Intent is not to be implied from subsequent Words 236
3. *Expres-*

The TABLE.

3. *Expressio eorum quae tacite insunt nihil operatur (in Margine)* Page 233

4. The Testator's Intent is to be collected from the Words of the Will, and not extrinſick Circumstances 235

5. And Words in a Will that are good Sense in themselves, are not to be transposed 236

6. And the legal Sense of the Words is to be taken, if a contrary Sense be not manifestly implied 238

7. The Word (*Granted*) in a Will construed as if it had been, *agreed to be granted* 225

8. *Note*; Matter that cannot appear till found, when found is not to be regarded in the Exposition of Wills 235

9. What Words in a Will give only an Estate for Life, and what a Fee, without *Heirs* *ibid.*

10. The Words *all my Estate*, in a Will, pass both the Thing and all the Testator's Interest therein 236

11. So, *I give all my Estate, Right, Title and Interest in, &c. and also the House called, &c.* gives a Fee in the House 234

12. So the Words, *whatever else I have not disposed of*, will carry a Fee in a Will 239

13. So a Devise to *A.* for Life, and then to be at her Disposal, &c. gives an Estate for Life with Power to dispose in Fee *ibid.*

14. See the Difference between a Power appendant to the Estate, and where it is collateral 240

15. Yet a Devise of all the Lands I shall have at my Decease will not pass Lands purchased after the Devise 237

16. But it seems otherwise in Devises of Chattels and Personal Estate *vide ibid.* and 238

17. A Devise of a Term of Years to several successively for Life, after all are dead, the Devisor's Executor shall have the Residue 231

18. A Devise to the first Son of *A.* (*A.* having none at that Time) is void *Page 229*

19. But a Devise to an Infant *in Ventre sa Mere*, is good, because *in esse* 230

20. Devise of the Rents and Profits of Lands to *A.* to be paid by the Executors, is a Devise of the Lands to *A.* 228

21. Limitation of a Term to *A.* and the Heirs of his Body, and if he dies *sans Issue*, living *B.* then to *B.* is good 225

22. Devise to *A.* and *B.* and their Heirs, and the longer Liver of them, equally to be divided between them and their Heirs, makes a Tenancy in Common 226, *vide* 391

23. A contingent Remainder must vest during the particular Estate, or *eo instante* that it determines 228, 238

24. *Ergo* a Remainder to the right Heirs of *J. S.* is void, if the particular Estate determines in the Life of *J. S.* 238

25. A Devise to *A.* for fifty Years if he so long live, Remainder to the Heirs Male of *A.* Remainder to *B.* the last Remainder takes Effect presently, because the first Remainder was void 226

26. A Devise to *A.* for Life, and if he have Issue Male, then to such Issue Male and his Heirs; and if he die without Issue Male, to *B.* and his Heirs; *A.* has but an Estate for Life, and both Remainders are contingent 224

27. *Note*; There may be a Possibility of Reverter where no Remainder can be limited (*vide supra* N^o 17.) 231

28. A Devise by the Father to the Son and his Heirs for ever, and for want of such Heirs then to the Right Heirs of the Father, is an Estate-Tail int he Son 233

The TABLE.

29. *A* having a Remainder in Tail with a Reversion in Fee, devises to one Son in Tail, Remainder to the other in Fee, is good; because it alters the Tenure Page 233

30. Devise to *A*. if *B*. a Stranger dies without Issue, is an Executory Devise ibid.

31. *Aliter* if *B*. were Tenant in Tail with Remainder to the Divisor ibid.

32. See the three Kinds of Executory Estates, and within what Time an Executory Estate ought to arise 229

33. A Limitation *per verba de presenti* will make an Executory Devise; *Aliter* if *per verba de futuro* 226

34. *A*. having two Daughters, one has a Son and dies, *A*. devises Lands to the Son, he takes by the Devise, and not by Discent 242

See also *Executors, Legacies, Uses* 9.
and *Wills*.

*Diocese, vide Administrations,
Bishops, &c.*

Discent.

1. A Discent which tolls Entry must be immediate 241

2. And Coverture to avoid such Discent must be continual ibid.

3. Where the same Estate is divided to one which he would have taken by Discent, he is in by the Discent notwithstanding the Possibility of a Charge 241

4. Yet *A*. having two Daughters, one has a Son and dies, and then *A*. devises to the Son, the Son takes the whole by the Devise 242

5. And there cannot be a Discent of a Moiety to one Coparcener as Heir ibid.

4

6. *Borough English* Lands descend to the Representative of the youngest Son Page 243

7. For where Custom makes an Heir, the Law implies all Incidents in the Course of Descents ibid.

8. But a Difference is between general Customs of which the Law takes Notice and special Customs ibid.

See also *Heir*.

Discontinuance of Estates.

1. *A*. Tenant in Tail levies a Fine to *B*. for *B*'s Life with Warranty, and after levies a Fine to the Use of *A*. and his Heirs with Warranty 244

2. The first Fine was a Discontinuance, but it was only a Discontinuance during the Life of *B*. ibid.

3. For a Discontinuance remains no longer than the wrongful Estate that causes it ibid.

4. Nor could the second Fine enlarge the Discontinuance, because thereby the Estate return'd back to the Conuzor ibid.

5. And if the second Fine had been to a Stranger, yet during the Life of the first Conuzee, it made no Discontinuance ibid.

6. There may be a Discontinuance which turns the Estate to a Right, and not take away Entry 245

*Discontinuance of Actions and
Process, vide Continuance,
&c. and p. 218, 219, 329.*

Disseisin and Seisin.

1. Mortgagee Covenants that Mortgagor shall quietly enjoy till Default of Payment, and then assigns 245

2. After such Assignment Mortgagor is only Tenant at Sufferance, but his

The TABLE.

his continuing in Possession does not turn the Term to a Right, nor make a Disseisin Page 245, 246

3. An Entry in Ejectment is not a real Entry, nor shall it avoid a Fine or make a Seisin 246

4. A bare Entry on another without an Expulsion makes only such a Seisin, that the Law will adjudge him in Possession only that has the Right, but not work a Disseisin 246

5. Where an Office is a Freehold the Denial of Fees is a Disseisin 333

See also *Entry forcible*.

Dissenters, vide Church of England and Universities.

Distress.

1. What Things are distrainable or not, *vide* 249

2. An Anchor and Sails of a Ship are distrainable for Port-Duties. 248,

3. Yet Goods deliver'd to a Tradesman to be manufactured are not for Rent 250

4. Nor Goods delivered to a common Carrier that carries them for Hire 249

5. Where Distress is without Cause, the Owner may rescue before Impounding, not after 247

6. Where a Distress escapes, the Distrainer can't bring Trespass, unless shewn to be without his Default 248

7. But if the Distress dies after taken, he may have Trespass for Damage-feasant *ibid.*

8. Where the Law gives a Distress for publick Benefit the Officer may sell 379

9. On a Distress in two Hundreds in different Counties, the Oath on Sale

may be administred by the Constable of either Page 247

See also *Damages, Replevin and Trespass.*

Distribution.

1. Brothers Grandchildren cannot share with Brothers Children 250

2. Aunt not intitled to share with Grandmother, the later being nearer of Kin 251

3. Any Person intitled to a Distribution may sue an Administrator in the Spiritual Court, to account, &c. *ibid.*

4. See the old Law of Distributions and Inheritances *ibid.*

5. And see how far Estates *pur autre vie* are Assets and distributable 464

See also *Administrations and Executors.*

Division, vide Apportionment.

Dower.

1. A *Feme* shall be endowed of the Capital Messuage or *Caput Baronie*, except of a Feudal Barony 253

2. But at this Day there are no Feudal Baronies except *Arundel* *ibid.*

3. A Tenant for Life, Remainder for Years, Remainder to *A.* in Tail, *A.*'s Wife shall be endowed 254

4. But otherwise if the *Mesne* Remainder had been for Life *ibid.*

5. *Detinue* of Chartets is no Plea in Dower after Imparlance 252

6. Tenant in Dower dies before Writ of Inquiry executed, Administrator can't bring a *Sci Fa* for the Damages and *Mesne* Profits *ibid.*

The TABLE.

E

Edifices, vide Houses, &c.

Ejectment.

1. **I**N Ejectment the Declaration must shew the *Quantum* of each Species of Land Page 254
2. Yet *De mineris Carbonum* without shewing the Number, held well in *Durham* 255
3. In Ejectment on Condition of Re-entry, Proof of actual Entry and *Ouster* is not necessary 259
4. See the Proceedings against the Defendant, if he does not confess Lease, Entry and *Ouster* ibid.
5. In Ejectment for an empty House a Lease is to be sealed in the same, and Entry, &c. made 255
6. And a Judgment therein set aside, because no Affidavit of such Lease, Entry, &c. ibid.
7. A Service upon the Servant, if the Defendant acknowledges he received it, is sufficient ibid.
8. Landlord may be join'd a Defendant if he request it, but is not compellable 256
9. A Wife may be made a Defendant in Ejectment, where the Husband is Lessor of the Plaintiff 257
10. A Church is demandable therein by the Name of a Messuage 256
11. *Note*; A special Rule was to defend *quoad* a Right of Entry to perform Divine Service ibid.
12. The Plaintiff in Ejectment is merely nominal, and he is a Trustee for the Lessor, and his Release is a Contempt 260
13. The Term laid in the Declaration, if it expires pending the Suit,

can't be enlarg'd without Consent

Page 257

14. After a whole Term elapsed the Plaintiff in Ejectment must give new Notice to plead, &c. ibid.

15. Execution on Judgment in Ejectment can't be sued out after the Year and Day without a *Sci' Pa'* 258

16. On a Judgment for the Plaintiff, if the Defendant brings Error, he ought not to bring a new Ejectment ibid.

17. Who may falsify a Recovery in Ejectment ibid.

Election of Actions, vid. Actions in General.

Elegit, vide Recognizance.

Entry forcible.

1. Tenant at Will not within any of the Statutes of Forcible Entry 260
2. In Inquisitions and Indictments thereon, both Expulsion and Disseisin must be expressly alledged 261
3. And tho' *Disseisitor* imports a Freehold, yet *Disseisitor* without *Expulsi* is ill ibid.
4. On an Inquisition removed into *B. R.* no Restitution can be if the Defendant traverses the Force 260
5. So if he plead, That he has been in three Years quiet Possession before the Force supposed ibid.
6. A Conviction thereof shall not be quash'd on Motion, if a Fine be set; *aliter* if no Fine set 450
7. See a Commitment for a Fine upon Conviction of a Forcible Detainer 353

Error.

1. A Writ of Error is a Writ of Right in all Cases but Felony and Treas-

The TABLE.

- | | |
|---|--|
| <p>Treason 504. And lies against the King Page 264</p> <p>2. But a Writ of Error is not proper to remove Indictments, &c. 266</p> <p>3. Error lies not from the Exchequer Court to the House of Lords, for the Exchequer-Chamber intervenes 511</p> <p>4. Upon Error in Parliament of a Judgment affirmed in <i>B. R.</i> new Bail is required 97</p> <p>5. Error lies to a new-created Jurisdiction of Record acting by the Course of the Common Law <i>ibid.</i></p> <p>6. But lies not in <i>Cam' Scac'</i> on 27 <i>Eliz.</i> on an Award of Execution after the original Judgment affirmed there 263</p> <p>7. Where a Writ of Error abates in <i>Cam' Scac'</i> no Judgment in <i>B. R.</i> without a <i>Remittitur</i> 261</p> <p>8. After Award of Execution on a <i>Sci' Fa'</i> the Defendant can't have Advantage of Matter pleadable to the <i>Sci' Fa'</i> 264</p> <p>9. But where 'tis awarded on two <i>Nichils</i> return'd, he may be reliev'd by <i>Audita Querela</i>, or on Motion <i>ibid.</i></p> <p>10. Also Matter contrary to the Surmise of the <i>Sci' Fa'</i> and pleadable thereto, is not assignable for Error 262</p> <p>11. Where a Writ of Error abates by Motion, the Court must be mov'd for Execution; <i>aliter</i> if for Variance 264, 265</p> <p>12. A Writ of Error abates not by Death of the Defendant in Error 264</p> <p>13. Where the Plaintiff brings Error, and the Court reverses, they give a new Judgment; <i>aliter</i> if the Defendant brings it 262</p> <p>14. Variance between the Plaint and Declaration in Inferior Courts is Error 266</p> <p>15. No Diminution can be alledg'd of Records out of Inferior Courts <i>ibid.</i></p> <p>16. Upon a Writ of Error the Court takes Notice of the Law or</p> | <p>Custom of Inferior Courts; <i>aliter</i> on an <i>Hab' Corp'</i> Page 269</p> <p>17. An Inferior Court may be held <i>per Legem Mercatoriam</i>, and not a Court of Staple 265</p> <p>18. An Original return'd by one not Sheriff is not assignable for Error <i>ibid.</i></p> <p>19. Irregularity in the Return thereof must be complain'd of the same Term <i>ibid.</i></p> <p>20. Where want of Original is assign'd, the Plaintiff in Error must sue a <i>Certiorari</i>, unless the Defendant confesses it 267</p> <p>21. And where want of Original is assign'd, and a Release is mispleaded, the Court may award a <i>Certiorari ad informand' Conscientiam</i> 268</p> <p>22. Also the Court may <i>ex Officio</i> award a <i>Certiorari</i> to supply a Defect in the Body of a Record, even after <i>In nullo est Errat'</i> pleaded 270</p> <p>23. But the Party himself shall not have a <i>Certiorari</i>, nor alledge Diminution after <i>In nullo est Errat'</i> pleaded <i>ib.</i></p> <p>24. For the Defendant by such Plea admits the Record to be perfect, and shall not afterwards alledge Diminution <i>ibid.</i></p> <p>25. Defendant in Error may sue out a second <i>Certiorari</i>, after a variant Original return'd on the first 266</p> <p>26. Continuances can't be return'd upon the same <i>Certiorari</i> with the Original 269</p> <p>27. <i>Note</i>; Error in Fact may be confess'd, but not Error in Law (<i>vide Numb. 20.</i>) 268, 269</p> <p>28. The Court cannot depart from the Point put in Judgment, if they do 'tis Error 268</p> <p>29. Error <i>coram Vobis</i> lies on an Affirmance in <i>B. R.</i> of a Fine levied in <i>C. B.</i> 337. <i>vide Fines.</i></p> <p style="text-align: center;">See also Amendment 8, 9, 30. and Averment 13.</p> |
|---|--|

M

Escape

The T A B L E.

Escape.

1. A precedent Assent of the Plaintiff will excuse an Escape, but not a subsequent Page 271
2. The Marshal not chargeable in Escape till Notice of the Commitment 272, 273
3. If one taken on an erroneous *Ca' Sa'* escapes, yet the Sheriff is liable; *aliter* if on a *Cap' ad respond'* 273
4. Discharge by a Court not having Jurisdiction is void, and therefore an Escape *ibid.*
5. *A.* levies a Complaint in the Sheriff's Court of *London* against *B.* being in Custody in a former Complaint by *C.* if *B.* escapes, *A.* may bring Escape 273, 274
6. See an Indictment against a Gaoler for negligent Escape of one committed to Prison, and charged with High Treason, held ill 272, 347
7. For 'tis not enough to say he was charged with High Treason, but he must be committed for it also *ibid.*
8. If one be committed to the Sheriff for a Crime, and the Gaoler suffer him to escape, the Gaoler is liable and not the Sheriff *ibid.*
9. For the Sheriff shall answer civilly for the Faults of his Gaoler, but not criminally *ibid.*

Escrow.

A Plea deliver'd as an Escrow ought to conclude to the Country 274

Estates, vide *Devises*, *Discontinuance*, *Que Estate*, *Fines*, *Recoveries* and *Tail*.

Estoppel.

1. A Lease for Years may operate as to Part by Estoppel, and as to 4.

the Residue by passing an Interest Page 275

2. Where an Estoppel works on the Interest of the Land, it runs with it, and is a Title 276
3. A Jury is bound by Estoppel unless the Party leaves the Fact at large by Pleading 3, 276
4. Where the Estoppel appears on Record the other Side may demur 277
5. A *Sci' Fa'* against Tertenants reciting a Judgment of a wrong Term, and on *Nul tiel Record*, Judgment for the Plaintiff, and *Elegit* thereon. In Ejectment the Defendant is estopped to take Advantage of the Variance 267
6. A Judgment against an Executor by Confession or Default is an Admission of Assets, and he is estopped to say the contrary on a *Devastavit* return'd, and so is a Jury 310

Estrays, vide *Waifs*.

Estreats, vide *Fines* and *Amerciaments*.

Evidence.

1. In Debt for Rent on Issue *Nil debet*, the Statute of Limitations may be given in Evidence; so in Case on *Non Assumpsit* 278
2. So in *Indebitatus Assumpsit*, on Issue *Non Assumpsit*, Infancy may be given in Evidence 279
3. In Ejectment, what Possession or Entry will prevent the Statute of Limitations (*vide Entry* and *Disseisin*) 285
4. Depositions in Chancery *de bene esse* are good Evidence at Law where the Witnesses die before Answer 278
5. But no Depositions *in perpetuam Rei memoriam*, &c. are Evidence in any

The TABLE.

- any Case as long as the Witnesses live
Page 286, 555
6. If one makes an Answer in Chancery which prejudices his Estate, it may be given in Evidence against him, but not against his Alience, *&c.* 286
7. Depositions before a Justice, if the Deponent die, may be Evidence in Felony, but in no Case else 281
8. A general History is Evidence to prove a Matter relating to the Kingdom in general, but not a particular Right or Custom *ibid.*
9. So a Year-Book to prove the Course of the Court, and Heralds Books to prove Pedigrees, *&c.* So Parish-Registers, *vide ibid. & 690*
10. A Record of Sessions may be Evidence to prove the Plaintiff had not taken the Oaths, and so his Office void 284
11. Also, the Matter of a Record lost may be proved by other Evidence 285
- * A Printed Statute no Evidence upon *Nul tiel Record* 566
12. Recital of a Lease in a Release is Evidence against the Releasor and those claiming under him 286
13. But not against others without proving there was such a Deed, and that 'tis lost or destroyed *ibid.*
14. A Counterpart no Evidence of an Indenture, unless old; or in Case of a Fine 287
15. Sentence of the Spiritual Court in a Cause within their Jurisdiction is conclusive Evidence in the Point tried, otherwise of a Collateral Matter 290
16. In Trover, by Administrator on the Intestate's Possession, Defendant can't give in Evidence a Will, on the general Issue; *aliter* if on the Administrator's own Possession 285
17. A Brewer's Book sign'd by a Drayman, that was dead, admitted to prove the Delivery of Beer *ibid.*
18. So a Shop-Book was admitted as Evidence on Proof of the Servant's Hand who made the Entries, he being dead *Page 690*
19. An Indenture of Bargain and Sale inroll'd may be given in Evidence without proving the Execution 280
20. Where upon *Non assump'* a Condemnation in Foreign Attachment may be given in Evidence or not, and how *ibid.*
21. And see a Condemnation after Original in Foreign Attachment brought before Original, held a good Discharge in Evidence on *Non assump'* 291
22. A Goldsmith's Note to pay is Evidence of his having receiv'd the Money 283
23. Payment of Money due to the Wife as Executrix is not Evidence to maintain an Action for Money receiv'd to the Husband's Use 282
24. In Debt for Rent, *Levy per Distress, & sic non Debet*, Payment or Release is good Evidence 284
25. But in Debt on Obligation, *&c.* if he pleads *Rasure, & sic non est factum*, nothing but *Rasure* is Evidence *ibid.*
26. What Evidence will be good or not to maintain Issues in Case, *Assumpsit, &c. vide* the several Titles
27. Declaration of a Trover in *Middlesex*, and Proof of one in *Ireland* is good 290
- † Where Denial is not Evidence of a Conversion in Trover 655, 666
28. Deceit of a Factor beyond Sea is Evidence to charge the Merchant here in Action of Deceit 289
29. On Indictment for a Cheat in procuring a Note from *A. A.* can't be a Witness, *Quare* 283
30. Yet *A.* being cheated was admitted as a Witness to prove the Fact on the Indictment 286
31. The

The TABLE.

31. The Pilot refus'd as a Witness in an Action for running over the Plaintiff's Barge with a Ship Page 287

32. The Son took the Father's Money and gave it to A. and the Son's Evidence admitted in *Trover* against A. 289

33. The Heir at Law may be a Witness of the Title, but the Remainder-Man not 283

34. Where a Plaintiff goes upon the Credit of divers Partners, the Act of one Partner is Evidence against the others, except they shew some Disclaimers 292

35. In Trespass on Not guilty, the Defendant can't give in Evidence that the Place was a Highway; *vide supra* 287

36. In Ejectment the Plaintiff makes Title by Recovery in Dower, the Defendant not admitted to prove a Term of Years prior to the Title of Dower 291

37. A Parol Promise to be performed on a Contingency not within the Statute of Frauds, tho' it happen not within the Year 280

38. Refusing to give Evidence to the Grand Jury is a Contempt and fineable 278

39. Indictment for breaking the Chamber of S. in the House of *James*, Evidence that it was the House of *Jameson* does not maintain it 385
See also *Proof and Witnesses*.

Exchange, V. Bills of Exchange.

Exchequer, vide Privilege of Place.

Excommunicato Capiendo.

1. At Common Law the Writ *De Excom' Cap'* was always general, not containing any special Cause, and returnable in *Chancery* 293

2. But since the Stat. 5 *Eliz. c. 23.* the Cause must be express'd in the Writ, and it is returnable in *B. R.*

3. And since that Statute the Court of *B. R.* may discharge the Party on the Insufficiency of the Return Page 293, 294

4. The Court of *B. R.* may either quash the Writ or award a *Superfedeas*, and a *Superfedeas* shall not go out of *Chancery* 293, 294

5. An *Excom' Cap' pro quibusdam Causis subtraction' decimar' sive al' Jur' Ecclesiast'* quash'd for Incertainty *ibid.*

6. So the Recital of the *Significavit* therein being *in quodam negotio puorum Educationis*, it was also quash'd for Incertainty 294

7. One taken on an *Excom' Cap'* can't come into Court but by *Habeas Corpus*, and that not before the Return of the Process *ibid.*

8. And if brought in before the *Excom' Cap'* is returnable, he can neither plead nor move to quash the Writ *ib.*

9. See one taken on *Excom' Cap' pro jactitatione Maritagii*, and Exceptions to the Writ disallow'd 294, 295

Executors.

1. No Funeral Expences are allowed for the Pall or other Ornaments 296

2. Necessary Expences to be allowed are only the Coffin, Bell, Parson, Clerk and Bearers Fees *ibid.*

3. He is compleat Executor before Probate for all Purposes but bringing Actions (see his Power) 301, 306

4. But tho' by the Will he has a Right vested, yet he can't sue for it till Probate 299

5. He may commence an Action before Probate but not declare 302

6. The Ordinary can't refuse Probate to an Executor because he is *incapax* 299

7. Nor

The TABLE.

7. Nor can he insist on Security from him, because the Testator has allowed him sufficient *Page 299*
8. None can prove a Will but he who is named Executor therein *309*
9. As where an Executor after administering and before Probate dies, his Executors can't prove it *ibid.*
10. And where the Executor dies, the Will not prov'd, the Spiritual Court grants an immediate Administration, and not *de bonis non* *304*
11. But if an administering Executor proves the Will, his Executor shall be Executor to the first Testator, and in that Case there needs no new Probate *309*
12. If an Executor becomes Bankrupt, Administration can't be granted, *contra* if *Non Compos*, because a natural Disability *36*
13. Where two are Executors, and one proves the Will and dies, the Executorship survives to the other *311*
14. But if the other then renounces, the Testator is dead intestate *ibid.*
15. Yet where several are Executors, and one only refuses, his Refusal is void *307*
16. And where the refusing Executor survives, Administration granted during his Life is void (*Q.*) *307, 308, 311*
17. So where an Executor Administers, and after refuses, Administration can't be granted during his Life *308*
18. An Obligor made Co-executor refuses and dies before the others who administered, the Debt is extinguished *ibid.*
19. The Executor of an Executor may renounce being Executor to the first Testator; but if he does not, he is Executor of Course *309*
20. If an Executor proves the Will, and after dies intestate, his Administrator cannot be Executor to the first Testator *ibid.*
21. But in that Case a Debtor being Executor, and the Debt thereby once extinguish'd, tho' his Administrator cannot continue the Executorship, that Inability will not revive the Debt *Page 309*
22. Yet where a Debtor is made Executor, the Debt is Assets *306*
23. For in that Case the Debt is extinguish'd not by way of Release, but as a Legacy *303*
24. An Obligor is made Executor and administers Part, but dies before Probate, the Debt is extinguish'd, and the Administrator *de bonis non* can have no Action for it (*Q.* of Creditors) *299, 300*
25. So where several are jointly bound, if the Obligee makes one of them his Executor, either sole or jointly with a Stranger, the Debt is released tho' the Obligor never administers *300, 301*
26. But where the Executor of one of the Obligors having no Assets is made Executor to the Obligee, this is no Extinguishment *305*
27. The Executrix of the Obligee taking the Obligor to Husband does not extinguish the Debt *306*
28. *Contra* if the Obligee herself takes the Obligor to Husband *ibid.*
29. If the Obligee is made Executor to the Obligor, and there is not Assets, he may sue the Heir *304*
30. An Administration granted *durante Minoritate Executoris* ceases at the Executor's Age of Seventeen *39*
31. One taking the Intestate's Goods before Administration granted is an *Executor de son tort*; *contra* if after Administration granted *313*
32. An Executor is chargeable in the *Debet & Detinet* for Rent incurred after his Entry *317*
33. But if the Rent be more worth than the Land, he may plead it *297*
34. Two *317*

The TABLE.

34. Two Executors join in an Acquittal, but only one receives the Money, both are chargeable to Creditors *Page 318*
35. But the actual Receiver is only chargeable to Legatees *ibid.*
36. Executor of a Master of a Ship can't sue in the Admiralty for Mariners Wages *33*
37. An Executor may pay Debts of a higher Nature after a Decree *quod Computet*, but not after a Final *307*
38. He may have an Action for a Right accrued in the Life of the Testator *12*
39. As for false Return of a *Fieri Fa'* or other Execution; *contra* of Mesne Process *ibid.*
40. He may bring Error and reverse an Attainder of Treason of his Testator, *per 3 contra Holt* *295*
41. In Debt for Rent of a Term he may plead No Assets, and that the Lands are of less Value than the Rent, &c. *297, 317*
42. For he can't waive for the Term only, but must waive the Executorship *in toto*, or not at all *290*
43. Action by two Executors, where the Probate was only by one, held well *3*
44. In Debt against him, Plea that he is Administrator, and not Executor, is not in Bar, but only in Abatement *296*
45. In Case against him, and *Plene Admin'* pleaded, the Plaintiff must prove his Debt, or shall recover but *1 d.* Damages, tho' there be Assets *ib.*
46. To a *Sci' Fa'* on a Judgment against the Testator, *Plene Admin'* not shewing how, is ill, on special Demurrer *ibid.*
47. To Debt on Bond he pleads fix Judgments; this confesses Assets for above five. And if the Replication takes Issue upon the *Riens ultra* so much, 'tis ill *312*
48. For his pleading of Judgments is a Concession of Assets to satisfy them, and the *Riens ultra*, &c. is not material *Page 312*
49. An Executor in pleading Judgments with Penalties should shew how much is really due thereon *311*
50. Where an Executor or Administrator is charged as Assignee, the Judgment is *De bonis propriis* *309*
51. But where one is charged as Executor, the Judgment shall be *De bonis Testatoris*, tho' he might have been charged as Assignee *316*
52. If one Executor appears on the *Capias*, and the other makes Default, Judgment shall be against both, *De bonis Test'* *312*
53. And if Error be brought both must join *ibid.*
54. If the Husband of a Feme Executrix convert Goods or Money, they become his, and 'tis a *Devastavit* *306*
55. A *Devastavit* may be return'd by the Sheriff on a *Fi' Fa'* without a *Sci' Fa'* Inquiry *310*
56. Judgment against Executor by Confession or Default is an Admission of Assets, and he is estopped to say the contrary on a *Devastavit* returned: And so is a Jury *ibid.*
57. A *Devastavit* lies for the Executor of an Executor of him to whom the Wrong was done, though not against the Executor of him that did it *314*
58. To a *Scire Fa'* upon an Interlocutory Judgment against an Executor, the Defendant can't plead a Judgment in Bar *42, 315*
59. In *Assumpsit* by Executor for the Testator's Money receiv'd to the Plaintiff's Use, the Executor shall not pay Costs on Nonsuit *314*
60. Where Executors may have *Assumpsit* for Money to the Testator *vide Action on the Case in Assumpsit* *28*
61. Where

The TABLE.

61. Where Action is brought within six Years, and the Plaintiff dies before Judgment and after the six Years, the Executor may pursue it *Page 425*
See also *Administrators, Assets, Devises, Legacies and Wills.*

Execution.

1. Execution on a *Fi Fa* in the Life of the Testator gives a Right to Executor *12*

2. Where it is necessary to return a *Fi Fa*, and where not, *vide 318*

3. Two *Fi Fa*'s deliver'd the same Day to the Sheriff who executes the last first, the Execution is good, but the Sheriff is liable to the Plaintiff in the first *320*

4. Judgment in Trespass against four, who bring Error, and one dies; the Plaintiff can't sue Execution *sans* suggesting the Death upon Record, but he need not sue a *Scire Fa* *319*

5. Where upon Death of the Party a *Sci Fa* is necessary or not *319, 320*

6. Note; A *Fi Fa* abates not by the Plaintiff's Death *322*

7. Where Execution is stayed by Injunction till after the Year, Plaintiff may sue a *Fi Fa* *ibid.*

8. A Defendant taken on a *Cap Utlag* after Judgment after the Year is in Execution at the Party's Suit, *sans* Prayer *319*

9. On a Judgment of *B. R.* in *Ireland* affirmed here, Costs must be levied by Writ out of *B. R.* there *321*

10. What is a Disturbance of Execution on an *Hab fac Possessionem ib.*

11. Writ of Error is a *Superjedeas* to Execution (not begun to be executed) as soon as allowed, and without Notice *ibid.*

12. The Sheriff that begun the Execution shall end it, tho' his Office expires *323*

13. And a Seizure of Goods by the Sheriff in Execution, divests the De-

fendant's Property, and discharges his Person *Page 323*

14. Q. The Bishop's Power to compel a Sequestration, on a Return of *Clericus beneficiatus, &c.* *320, 321*

15. To what Executions the Statute of 29 *El. c. 4.* extends, and what not, *vide bis 321*

16. Note; Execution may go on Affirmance on Convictions, either by *Levari Fa, Fi Fa* or *Ca Sa* *369. vide 379*
See also *Judgments.*

Exposition of Words and Sentences.

1. Where Words are capable of different Expositions, that Sense shall be taken which supports the Declaration, Deed or Argreement, and not that which defeats it *324, 325*

2. Where Words that are Nonsense, or contradictory to others, shall be rejected or not *69, 325*

3. See the Words *Pro defectu talis Exitus* explained *622*

4. For Expositions of Words in Wills and in Statutes, *vide Devises* and *vide Statutes.*

5. See also the particular Exposition of these Words, *viz.*

Assideo 328

Averia 249

Consuevit 459

Convenient Time 133

Cottage 169

De, Ex and In 474. &c.

Effectus, vide Tenor

Et 640

Or Executors 61

Extorsive 681

Felonice ibid.

Feudal Barony 352

Furlinga, Hida, &c. 354

Granted 225

Hereditament 349

Hotchpot 426

Hypothecation 34, 35

Indorsavit 375, 376

Innuendo

The TABLE.

<i>Innuendo</i>	Page 513
<i>Item</i>	239.
<i>Juxta tenorem</i>	324, 417, 660
May for shall	609
<i>Particeps criminis</i>	22
Peculiars	41
<i>Pons Pedalis, and Pons Pedestris</i>	359
Prisage	617
<i>Quare, and Quod cum</i>	636
Salvage	254
<i>Tenor and Effectus</i>	324, 417, 660
<i>Vadium</i>	552
<i>Videlicet</i>	681
<i>Villa</i>	501

See also *Trespass* and *Variance*.

Extent, vide Recognizance.

Extinguishment.

1. Bond to pay Money after Marriage between the Obligor and the Oblige, the Intermarriage only suspends but not extinguishes the Debt 325
2. So a Feme Executrix of an Obligee marries the Obligor, 'tis no Extinguishment 326
3. Husband may release a Duty which by Possibility may accrue to the Wife during the Coverture, otherwise not *ibid.*
4. Administrator may retain a Bond-Debt against Rent, but he can't plead a Bond to another *ibid.*

See also *Administrators* and *Executors*.

Extortion, vide Usury.

F

Fairs, Markets and Tolls.

1. **I**N *Trespass* the Defendant justified as Clerk of the Market for a Distress for not using Sealed Measures 327
2. *Q.* Whether the Clerk of the Market can distrain *ex Officio* for using unlawful Measures *ibid.*

1

3. *Per Holt*, He cannot have a Power to estreat Fines and Amerciaments otherwise than as a Franchise Page 327

4. And 'tis more reasonable he should bring the Standard thither, than that People should follow him out of the Market *ibid.*

5. See an Indictment for speaking Words to the Prejudice of a publick Market, quash'd 370

False Latin.

1. False Latin, *i.e. quidem* for *quidam*, abates not an Appeal 328

2. And *Affident damna* for *assidum*, held well in a Verdict *ibid.*

3. Two Negatives in Grants may be taken as a Negative, *contra* in Pleadings because in Latin *ibid.*

And see *Indictment* and *Obligation*.

Failer of Record.

1. Upon *Auter Action pendant* pleaded, a Discontinuance after *Nul tiel Record* replied will not avoid it 329

2. *Aliter* of a Reversal by Error; for there if *Nul tiel Record* be pleaded, and before the Day to bring in the Record the Judgment is revers'd, it avoids the Record *ab initio*, and is a *Defecit de Recordo* *ibid.*

3. See where *Variance* in the Record declared on, and that produced, makes a *Failure* 659

See also *Record*.

Fees.

1. A *Quantum meruit* lies for Fees for serving as a Commissioner on a Commission to examine Witnesses 330

2. If the Sheriff executes a Writ, he shall have his Fees tho' the Writ be erroneous, &c. 332

3. Debt lies for Fees for executing an *Elegit*, as well as an *Extent* 333

4. And

The TABLE.

4. And upon a *Capias ad satisfac'* the Sheriff shall have his Fees for the whole Debt. (*Quære of Elegits*) Page 331
5. But the Statute 29 *El. c. 4.* for Sheriffs Fees, does not extend to Executions on Statutes, Recognizances, &c. because the Judgment is not in *inuitum* 332
6. Nor does it extend to Executions out of Inferior Courts. 331
7. Under-Sheriff can't refuse to execute Process till he has his Fee, if he does he may be indicted for Extortion 330, 331
8. No Rule to be for referring an Attorney's Bill deliver'd for Fees, except an Action be pending thereon 332
9. If an Office be a Freehold the Denial of just Fees is a Disseisin 333
10. Suits for Fees in the Ecclesiastical Court are to be prohibited 330
& *his* 333
11. The Register of a Spiritual Court cannot sue there for his Fees 333
12. And a Prohibition to a Suit there for Fees for swearing Churchwardens. 330
13. No Fees due for Christenings or Burials unless by Custom; and then he must do the Duty 332, 334

Felony.

1. If several make a Riot, and a Man is kill'd, they are all Principals in the Murder 334, 335
2. How Murder has Relation to the Stroke 614
See also *Appeals, Indictments* and *Principal*.

Fences, Inclosures.

1. Action lies for suffering a Fence to be out of Repair, *per quod* the Defendant's Cattle entred the Plaintiff's Close, &c. 335

2. And in that Case either Trespass or Case lies, at Election. See the Reason of either Page 335

3. Where a Charge against Common Right is laid on the Owner of the Soil, the Plaintiff must make a Title, and a Prescription is sufficient. *ibid.*

4. But where the Charge is on the Defendant of Common Right, the Plaintiff need not prescribe in his Declaration 22

5. A Prescription laid in *Tenentes & Occupatores* is well 336

Feoffments, vide Fines, Recoveries, &c.

Ferries, vide Page 12.

Fieri Facias, vide Execution.

Fines and Amerciaments.

1. Amercements *pro falso Clamore* at Common Law were affected by Jury on a Warrant to the Coroners 14

2. Amercements may be general *quod sit in Misericordia*, and afterwards affected to a certain Sum 56

3. Defendant may be amerced twice in the same Action where there are two final independent Judgments 54

4. In Trespass, &c. no Judgment is entred *pro Fine* in *B. R.* since the Stat. 5, 6 *W. 3. aliter* in *C. B.* *ibid.*

5. Judgment for a Fine may be given in the Defendant's Absence upon any Persons Undertaking to pay it 56

6. On confessing an Indictment and submitting to a Fine, Affidavits may be read to prove the Defendant assaulted the Plaintiff; *contra* after Conviction 55

7. Prosecutor cannot move to aggravate the Fine after his accepting of Costs *ibid.*

8. Issues are never estreated by special Rule unless in extraordinary Cases *ibid.*

O

9. Of

The TABLE.

9. Of discharging Estreats upon Motion in the Exchequer, see Page 54, 55

10. The Course on Return of a Rescue is to set four Nobles Fine on each Offender 586

11. One outlawed for a Misdemeanor cannot thereon be fined for the Fact 494

12. A Fine on a Nuisance pardoned by a general Pardon, but the Abatement not excused 458

13. The Cause for which a Fine is set is never reversible 397

See also *Entry Forcible, Indictments, &c.*

Fines and Feoffments.

1. Why a Fine is called a Feoffment of Record, see 340

2. A Fine with Grant and Render is tantamount to a Feoffment and Re-feoffment, and the Render creates a new Estate 337

3. A Fine *sur Conuza*, &c. *come ceo*, &c. implies a Fee-simple, but that may be qualified to a particular Estate 340

4. A Tenant in Tail with a Remainder in Fee makes a Lease, and dies before Commencement, and the Issue levies a Fine. The Lease is good against the Conuzee 338

5. Yet held that the Estate-Tail was extinct by the Fine. See the Reasons *ibid.*

6. A Fine may be levied in any real Action, as a Writ of Right, &c. but not in Personal 340

7. And the Writ of Covenant, on which a Fine is levied, is a real Action *ibid.*

8. A Fine of Lands in Antient Demesne works a Discontinuance, but no Bar *ibid.*

9. A Fine is of that Term the Concord was made, and the Writ of Covenant returnable 341

10. Error *coram Vobis* lies in B. R. on an Affirmance there of a Fine levied in C. B. Page 337

11. Yet a Writ of Error in B. R. to reverse a Fine in C. B. removes the Transcript only. 341

12. On Error to reverse a Fine, a *Sci' Fa'* must go against the Tertenants 339, 398

See also *Recoveries and Uses, &c.*

Forcible Entry, vide *Entry Forcible.*

Foreign Attachment, vide *Evidence*, N^o 20, 21. and p. 273.

Forfeiture.

1. Non-Attendance is good Cause of Forfeiture of the Office of Recorder 435

2. Act of the Deputy may forfeit the Office of the Principal 19

Forgery.

1. The Stat. 5 *El. c.* 14. mentions false Deeds as well as Writings, and therefore *Scriptum* or *Factum*, &c. is well 342

2. In Indictment for forging a Deed with the Mark of *J. S.* the Mark it self need not be set forth. *ibid.*

3. *Fabricavit, seu Fabricari causavit*, is ill in an Indictment of Forgery 342, 371

4. No Forgery can be where none can be prejudiced by it but the Person doing it 375

See also *Indictments.*

Franchises and Liberties.

1. Where there is a Franchise of a Prison there must be a Gaol-Delivery 343

2. What

The TABLE.

2. What Franchises were granted to the University of Oxford by Charter 14 H. 8. Page 343

3. A Franchise can't be allow'd upon Motion, unless it has been formerly pleaded, and is upon Record 450

See also *By-Laws, Courts Inferior.*

4. How the Statute for Discharge of poor Prisoners is to be pleaded Page 521

See also *Arrests, Bail, and Habeas Corpus.*

Grants.

1. Lessee for Years grants the Land, *Habendum* for the Residue after his Death, the Term vests presently, and the *Habendum* is void 346, 347

2. A Termor grants or devises generally. The Grantee is Tenant at Will, but the Devisee has the Term ibid.

3. See the Exposition of the Word *Granted* in a Will 325

See also *Fines, &c. and Jointenants, and Patents.*

Grants of the King, vide King and Patents.

G

Gaming.

1. A Wager concerning the right Manner of playing not within the Statute against Gaming 344

2. The Winner shall not recover on a Bill against the Acceptor for Money won at Play; *aliter* against the Indorsee 344

3. A. may lose 100*l.* to one, and 100*l.* to another upon Tick, because several Contracts; *aliter* if a joint Contract 345

4. So if he lose 200*l.* in ready Money, and afterward 100*l.* more for which he gives his Note, the Note is good ibid.

5. So in *Assumpsit* for 40*l.* a Plea that it was won at Play, and that at the same Sitting he lost 66*l.* to another, is ill ibid.

6. For when 166*l.* is lost to several Persons, 'tis not within the Statute, unless they join in the Stakes, or there be Fraud ibid.

Gaol.

1. Where there is a Franchise to have a Prison, a Gaol-Delivery is incident. 343

2. If a Prisoner be at large or out of the Gaol he may be arrested 345

3. See the Course of charging a Prisoner when in actual Custody ibid.

H

Habeas Corpus.

1. A Commitment for Treason in aiding the Escape of A. committed for Treason, ought to specify the Treason for which A. was committed 272, 347

2. See a *Habeas Corpus* for one in Custody at the King's Suit, and turned over because the Action was precedent to the King's Extent. 353

3. But one committed for a criminal Matter was on the like *Habeas Corpus* remanded 354

4. One committed to the Marshal by Warrant of the Chief Justice of B. R. ought to be brought up by *Habeas Corpus*, and not by Rule 349

5. A Commitment by Commissioners of Bankrupts till the Defendant conform to their Authority, is ill 348

6. And

The TABLE.

6. And so is their Commitment till he shall be discharged by due Course of Law. For the Statute says, till he submit to be examined by the Commissioners Page 351

7. So a Commitment on 35 *El. c. 2.* till he should be delivered by due Course of Law, is ill *ibid.*

8. See a Commitment for a Fine upon a Conviction of forcible Detainer 353

9. One committed by the Admiralty in Execution is not removable into *B. R.* to answer an Action there 351

10. And one brought into *B. R.* shall not be brought into any other Court till he has answer'd there 350

11. If a Commitment in Execution by a Court of *Oyer* and *Terminer* be wrong in Form only, the Defendant can't be discharged on *Habeas Corpus*, but is put to his Writ of Error 348

12. *Note*; all Commitments in Execution by Courts of *Oyer* and *Terminer* ought to be to the Sheriff or his Gaoler, and the Word *Committitur* to be therein *ibid.*

13. Where the Commitment is by Warrant, the Officers must return the Warrant 349

14. *Aliter* of Commitments by a Court to a proper Officer in Execution *ibid.*

15. A *Habeas Corpus* quash'd, because directed to the Sheriff or Gaoler in the Disjunctive 350

16. An *Alias Habeas Corpus* granted upon insufficient Return of the former *ibid.*

17. A *Habeas Corpus* lies not to the County Palatine of *Chester* 354

18. A *Habeas Corpus* after interlocutory Judgment, then the Defendant died, and a *Procedendo* awarded 352

19. A *Procedendo* may be awarded after filing the Return of a *Habeas Corpus*. *ibid.*

I

20. For the Record itself is never removed by *Habeas Corpus*, as 'tis by a *Certiorari* Page 352

21. Therefore on Removal by *Habeas Corpus* the Plaintiff here must begin *de Novo*, and declare against the Defendant as *in Custod' Mar'* *ibid.*

22. The *Habeas Corpus* suspends the Power of the Court below, and while pending, Proceedings there are *coram non Judice* *ibid.*

23. On Commitments by House of Commons no Court can deliver on a *Habeas Corpus*, per 3 *contra Holt* 503
See also *Certiorari*, and p. 8.

Heir.

1. He can't plead a Term for Years rais'd by his Ancestor, in Delay of Execution; but should confess Assets 354

2. And if he so pleads, a general Judgment shall be given for his false Plea 355

3. Where a Defendant is sued as Heir, the Declaration need not shew how he is Heir. *ibid.*

4. What Words give an Estate for Life or in Fee, without the Word *Heirs*.
See also *Discent* and *Executors*.

Heriot.

1. Heriot-Custom or Heriot-Service may be seised any where, but not distrained for out of the Manor 356

2. Where a Heriot is due upon Death of the Copyholder it can't be altered by any Act of his 189

Highways, Rivers, Bridges.

1. Justices can't appoint six Days to work in Highways, between such a Day and such a Day in general, but must particularly express what Days 357

2. See

The TABLE.

2. See the Construction of 2 *W. & M. Stat. 2. c. 6. Sect. 2.* for repairing the Pavement of Streets Page 356
3. Inhabitants repairing before their own Doors not excused from Scavengers Rates *ibid.*
4. Where Inhabitants submit to a Fine, they must also repair the Way before discharged 358
5. Indictment for suffering a House on the Highway to be likely to fall, lies against Tenant at Will. 357
6. The Subject has a Right to fish in all Navigable Rivers; and *Q. if sola Piscaria* may be therein *ibid. V. 637*
7. The County is liable to repair a publick Bridge, unless they can charge a particular Person 359
8. A Manor held by Service of repairing a Bridge, a Tenant of any Part is liable to the whole Charge 358
9. And the Charge continues tho' the Manor come to the Crown *ibid.*
10. Indictment for not repairing a Foot-bridge (*Pons pedalis*) is ill, it should be *pedestris* 359
11. Indictment or Information lies for not keeping up a Ferry, *vide* 12

Homine Replegiando, *vide* *Replevin*.

Houses and Buildings.

1. In what Cases one Man may compel another to repair his own House, *vide* 22, 360
2. An Indictment lies against the Tenant for suffering a House near the Highway to be likely to fall 357
3. Where the Defendant's Privy is separated by a Partition Wall from the Plaintiff's Cellar, the Defendant is to repair the Wall 22, 360
4. One indicted and fined for maintaining a Glass-House at *Lambeth* 458

5. A *Quod permittat* lies, *prostertere quadam Aedificia* Page 458, & *bis* 459

6. Concerning Houses and Buildings in *London*, *vide* 425

House of Correction.

1. Justices of Peace in Sessions may by 39 *El. c. 4.* increase the Number of Workhouses if necessary 362
 2. But it must be done at the Charge of the whole County *ibid.*
 3. And the Sessions can't delegate their Authority to particular Justices 363
 4. The Statute 39 *El.* continued by 3 *Car. 1.* *ibid.*
- See also *Poor*, &c.

Hypothecation, *vide* *Admiralty*.

I

Ideot, *vide* *Lunatick*.

Jeofails.

1. **I**nsufficient Return of a *Devastavit* aided by Verdict 363
2. *Note*; After Verdict it may be intended no Damages were given for Matter insensible 129, 364
3. But it shall not be so intended for Matter sensible tho' insufficient in Law *ibid.*
4. In *Assumpsit* after Verdict, Judgment arrested because *nudum pactum* 364
5. Declaration of Copyhold Lands without saying *ad voluntat' Domini*, held well after Verdict, because alleged to be Parcel of the Manor 364
6. In pleading Copyhold 'tis sufficient to shew the Grant of the Lord 365
7. But in customary Freehold the Estate of the Surrenderor must be shewn *ibid.*
8. A

The TABLE.

8. A Termor for Years can't declare on a *Que Estate* Page 363

9. A Verdict will not aid a bad Title when shewn, tho' it need not be shewn 365

10. But it will aid a Title where defectively set forth *ibid.*

11. See the Diversity between Common belonging to the Estate, and to the Land 170, 366

12. An Information on a penal Statute by a common Informer not within the Statute of Jeofails 325

13. What are Statutes of Amendments, and what of Jeofails 51

See also *Amendments, Arrest of Judgment, and Declarations.*

Imparlance.

1. Clerks of *B. R.* order'd to make up Post-Rolls, and not to enter special Imparlanes in Lieu thereof 367

2. Imparlanes upon Informations in what Cases grantable and for how long, *vide bis* *ibid.*

3. No Imparlanes to be allowed in Assizes without good Cause shewn 83

4. What may not be pleaded after Imparlance, *vide* Abatement, &c. and 622

See also *Pleas, &c.*

Incident, Appendant, and Appurtenant.

1. Things set up by Lessee for Years for Convenience of Trade are removable during the Term 368

2. And are likewise seizable on a *Fi Fa'* *ibid.*

3. But Fire-hearths, Chimney-pieces, &c. set up by a Termor to compleat the House, become Part thereof and are not removable *ibid.*

Inclosures, vide Fences.

Indictments, Informations, Inquisitions, &c.

1. Indictment for a Riot and Assault; Acquittal of the Riot is so of the Assault Page 593

2. Indictment for Assaulting a Duke's eldest Son, styling him by his Father's second Title, as in common Parlance, is ill 451

3. See several Indictments quash'd for false *Latin*, viz. *presentat'* for *presentat'* 370, 371

4. So when the Charge is in the Disjunctive, as for making or causing to be made 342, 371

5. And the Charge in Indictments, Informations, &c. must be express, not argumentative, &c. 375, 631

6. As Indictment for indorsing Exchequer Bills, as if received for Customs, Judgment arrested 375

7. So two Indictments were quash'd because the Charge was laid only with a *Quod cum*, or Recital 371

8. An Indictment lies for not receiving, turning off, or not providing for a poor Apprentice 381

9. But Indictment lies not for enticing an Apprentice from his Master 380

10. An Indictment may be at a Borough-Sessions on 5 *El.* for exercising a Trade not serving as an Apprentice 370

11. But two Persons can't be jointly indicted thereon for exercising a Trade, &c. 382. *Contra* for Extortion *ibid.*

12. See the Judges Opinion in the Case of Informations on the said Stat. 5 *Eliz. c. 4.* 373

13. Indictment may be for keeping a Bawdy-House, but not for being *communis lena* 382. Also no Indictment lies for Adultery at Common Law 552

14. In-

The TABLE.

14. Indictment well lies against the Husband and Wife for keeping a Bawdy-House Page 384

15. A Cheat is not indictable unless he come with false Tokens 379

16. A Constable or other Officer is indictable for neglecting a Duty required by Common Law or Statute 380

17. An Indictment is only *Billa* before the finding, and after finding 'tis *Indictamentum* 376

18. If an Offence sufficient to maintain the Charge be well laid, 'tis sufficient, tho' other Facts be ill laid 385

19. As *Verberaverunt, Vulneraver*, &c. is good without *Insultum fecit*, because Battery implies an Assault 384

20. Indictment for Preaching not being licensed, quash'd, because not said *contra formam Statuti* 370

21. Indictments for any heinous Offences, and Informations filed by the Attorney General, not to be quash'd on Motion 372

22. Motion for an Information of Perjury denied: For *per Cur'*, you may indict him 374

23. Where two Indictments are for the same Fact, proper to try on both at once 382

24. When a Recognizance for trying an Indictment, on Removal, is forfeited or not 370

25. No Motion to quash Indictment remov'd by *Certiorari* after the Recognizance forfeited 380

26. Where the Defendant shall give Security to try it, on a Removal by the Prosecutor 652

27. An Indictment try'd in *B. R.* is entred on the Plea-Roll, but if at the *Old Baily* 'tis put in a Bag, &c. 371

28. Indictment for breaking the Chamber of *S.* in the House of *James*, Evidence it was the House of *Jameson*, ill 385

29. Where a Matter concerns the publick Government, and no particu-

lar Person intitled to an Action, an Information will lie Page 374

30. An Information may be for false Return of a *Mandamus*, not for Perjury. *ibid.*

31. No Process can issue on Informations before a Recognizance given by the Informer. 376

32. Information or popular Action on penal Statutes made before 21 *Jac.* 1. c. 4. can't be brought into *B. R.* unless for Facts done in the County where the Court sits 372

33. Also Debt lies not in *B. R.* on any penal Statute made before 21 *Jac.* 1. *secus* of penal Acts made since 373

34. One outlawed by Process in Information, if he comes in and reverses the Outlawry, must plead *instante* to the Information 371

35. See an Information, *Quo Warranto* they admit Persons not Inhabitants to be Freemen 374

36. And note the different Judgments on Writs of *Quo Warranto* and Informations *ibid.*

37. A Coroner's Inquisition quash'd because the Wound not set forth, nor that the Party died of it 377

38. A Coroner may cause the Body to be taken up soon after Burial, but not after a long Time *ibid.*

See more of *Inquisitions* and *Informations* in *Office for the King, Perjury, Riots, &c.* and p. 12, 325, 514, 587, 660.

39. For Deer-stealing, if Information be in due Time, the Conviction may be at any Time afterwards 383

40. And in summary Convictions Appearance aids want of Summons *ibid.*

41. Also such Convictions are to be taken strictly against the Offender 378

42. Therefore need not be laid *contra Pacem*, and *juxta formam Statuti* is sufficient *ibid.* & 383

43. Also

The TABLE.

43. *Alfo Consideratum quod Convi-
ctus est* is enough, without *forisfaciet*

Page 378, 383

44. And that between such a Day
and such a Day he killed three Deer
is well 378

45. And that Oath was made *De
veritate premissorum*, is enough 369

46. How Execution shall go on
Affirmance of Convictions, *vide* 369,
378

47. And the Executor of the Own-
er may sue Execution 379

48. Q. If Conviction of Deer-steal-
ing be pardoned by Act of General
Pardon 383

49. On 3 & 4 *W. & M. c. 5.* a Sel-
ler of Deer-Skins may be convicted
ibid. and see 542

50. Of Averments in Indictments
vide 611

See also *Actions Popular, Convic-
tions, Forgery, Nuisance, Perjury,
Statutes, Usury, Words indicta-
ble, &c.*

Infants.

1. An Infant may buy Necessaries,
but cannot borrow Money to buy Ne-
cessaries 279, 286, 387

2. Also a Bond given by an Infant
or Ideot for any Purpose is void 675

3. In *Indebitatus Assumpsit*, Infancy
may be given in Evidence on *Non
Assumpsit* 279

4. Custom of a Manor, that if the
Surrenderee appears not on three Pro-
clamations, he forfeits, binds not an
Infant 386

5. See divers Cases cited of Reco-
veries suffered by Infants on Privy
Seals, but disallowed 567

6. In Appeal, &c. the Writ and
Suit of an Infant is subject to the Di-
rection of the *Prochein Amy*, not of
the Infant himself 176, 177

And see Page 95.

Inns and Inn-keepers.

1. One takes Lodgers to lodge and
diet, and lets Stables for their Horses,
not an Inn-keeper within 4 & 5 *W.
& M. c. 13.* for Quartering Soldiers
Page 387

2. Note; A Lodger is upon express
Contract, a Guest not; if a Guest
steal 'tis Felony, if a Lodger, not 388

3. One by leaving his Horse in an
Inn becomes a Guest; *secus* of a dead
Thing *ibid.*

4. An Inn-keeper (tho' Part-owner
of a Ship) held not within the Sta-
tutes of Bankrupts 109

See also *Alehouses*, and p. 18, &c.

Innuendo, *vide Exposition of
Words.*

Inquisition, V. *Indictments, &c.*

Inrolment.

1. A Deed may be inrolled with-
out the Examination of the Party,
upon Proof by Witnesses of its Deli-
very 389

2. The Party died before Acknow-
ledgment, yet the Deed was inrolled
ibid.

3. And where two are Parties, Ac-
knowledgment by one binds the o-
ther *ibid.*

4. A Rule that all Deeds be ac-
knowledged on the Plea-side and in
open Court *ibid.*

Institution and Induction, *vide
Bishops and Presentation.*

*Jointenants, Tenants in Com-
mon, &c.*

1. Where the Words, *equally to be
divided*, make a Jointenancy, or Te-
nancy in Common 226, 391, 392

2. Grant

The TABLE.

2. Grant of 100 l. Rent to five, equally to be divided, to hold to them, viz. 20 l. to each, &c. they are Jointenants Page 390

3. So a Grant to A. and B. *habend'* one Acre to A. and the other to B. they are Jointenants 391

4. One Tenant in Common may disseise his Companion, i. e. by an actual *Ouster* 392

5. Tenants in Common may be by Prescription, but not by Wrong 423

6. They cannot join in an Ejectment, 423. Nor in an Avowry 390

7. But Coparceners must join in an Avowry, 390. *vide* 187

8. See the Difference between Coparceners and Tenants in Common, as to pleading a sole Seisin 629, 630

9. The Possession of one Jointenant is Possession of the other, so as to prevent the Statute of Limitations 285

10. And if one Jointenant levies a Fine, tho' it serves the Jointure, it does not oust his Companion 286

11. One Jointenant of Chattels can't bring Trover against his Companion, but may against a Stranger 290

12. Where one Coparcener will take Advantage of a Forfeiture, and the other not, Q. if an Apportionment shall be 187

Joint and Several.

1. Two Coparceners, Execution against one, the Sheriff must seise all the Goods, and sell an undivided Moiety 392

2. What Words make a Covenant or Obligation joint or several, *vide* 393

See also *Apportionment* and *Jointenants*.

Journeys Accounts.

Where one not Party to the first Writ may have a Writ by *Journeys Accounts* 393

Issue General.

1. In Debt the Defendant may plead a Release, or give it in Evidence on the General Issue of *Nil Debet* Page 394

2. So in *Assumpsit* he may plead Payment or give it in Evidence on *Non Assump'* ibid.

3. Yet held, That Performance in *Assumpsit* amounts to the General Issue ibid.

4. In Trespass, Plea, That it was the Horse of J. S. and the Plaintiff took and impounded it, and that the Defendant took him by Replevin, amounts to the General Issue ibid.

See also *Pleas* and *Traverse*.

Issues and Profits.

1. Issues of Lands not forfeited by Outlawry till Inquisition taken; and Alienation before Inquisition is a *Bar* 395

2. Issues of a Jointenant for Life are leviable on him in Reversion ibid.

3. Beasts of a Stranger Levant and Couchant are seizable on a *Levari Facias* ibid.

4. So of a Jointenant and Commoner, unless the Title found by the Inquisition ibid.

Judge.

1. The Mayor of H. committed for sitting in Judgment where he was Party, tho' by the Charter the only Judge there 396

2. Where one acts as a Judge, his Act is not traversable; *aliter* of an Officer, as a Constable, &c. ibid.

3. A Judge not answerable for Error of Judgment either by Action or Indictment 397

4. Mayor and Commonalty of L. may limit Penalties of By-Laws to themselves 397

Q

5. But

The T A B L E.

5. But such Penalties can't be sued for in the Mayor's Court; *aliter* if the Mayor could be severed Page 397, 398

6. Mayor is Head of the Corporation, and an Action by them abates by his Death *ibid.*

Judgments.

1. Judgment for a Fine may be given in the Defendant's Absence, but not for any Corporal Punishment 56, 400

2. Judgment may be given after the Plaintiff's Death, if it be within two Terms after Verdict 401

3. There must be four Days exclusive between the Day in Bank and the Signing of Judgment 399

4. In what Cases Judgment may be enter'd on the peremptory Rule without Motion *ibid.*

5. Judgment on Demurrer to a Plea must be enter'd with *Et quia videtur Curia quod placit' predict', &c.* 402

6. If the Plaintiff in a *Monstrans de Droit* fails in his Title, no Judgment need be given for the King 488

7. See the Forms of entring Judgments on *Non prof. &c.* 455, 456

8. Judgments ought to be compleat and formal; and a Dismission is no Judgment 511, 512

9. A Warrant to confess Judgment may be given in Custody, and how 402

10. Warrant to confess Judgment by a *Feme*, who afterwards marries, is thereby revok'd 399

11. Yet Judgment confess'd by a *Feme Covert* refused to be set aside on Motion 400

12. Where a Judgment is confess'd on Terms, the Court will take Notice of them; *aliter* if the Agreement is subsequent 40

13. Judgment for a scandalous Li-

bel altered the same Term, and the Punishment increased Page 401

14. Upon Writ of Inquiry after Interlocutory Judgment, where the final Judgment must be against the Administrator 42

15. Bringing Debt upon a Judgment is no Waiver of the *Lien* created by that Judgment 80

16. And Debt will lie in an Inferior Court on a Judgment in *B. R. (Q.)* 439

17. Judgment of a Superior Court is only voidable, tho' a private Statute says it shall be void 674

18. On Payment of Costs, Judgment will be set aside tho' regularly entred, if the Plaintiff has not lost a Trial 402

19. No Reference for Irregularity after Writ of Error brought *ibid.*

20. What Judgment shall be given on a Writ of Error, *vide* 401

21. A Judgment can't be reversed in part and affirmed in part, unless part is by Common Law and part by Statute 24

22. If Judgment for Defendant on special Verdict be reversed in Exchequer-Chamber, that Court shall give the new Judgment; *aliter* if on a Demurrer 403

23. If a Judgment of *B. R.* be reversed in Parliament, the new Judgment must be entred in Parliament *ibid.*

See also *Attornies, Arrest of Judgment, Confession, and Convictions.*

Jurisdiction.

1. All Jurisdiction is deriv'd from the Crown 510

2. In Inferior Courts every thing that makes the Gift of the Action must be laid within the Jurisdiction 404

3. *Aliter*, if only Matter of Aggravation *ibid.*

4. Bill

The TABLE.

4. Bill may be in *Chancery* to foreclose a Mortgage on Lands out of its Jurisdiction, if the Person be within it
Page 404

5. See a Diversity where two Courts have Jurisdiction of the same Thing, and where not 195

6. And see the Jurisdiction of Justices and the Sessions, touching Apprentices 67

See also *Courts Inferior, Justices, Sessions, &c.*

Jury and Juror.

1. See the Rules of striking Juries by the Master, and the Practice therein 405

2. Jurors ought to acquaint the Court that they can give Evidence before they are sworn *ibid.*

See also *Challenge, Trials, and Verdicts.*

Justices of Peace.

1. Authority given to Justices of Peace must be exactly pursued 475

2. Indictment for Forgery lies not before Justices of Peace (*vide Convictions and Indictments*) 406

3. See their proper Method of proceeding on 14 *Car.* 2. for Removals of Poor *ibid.*

4. They have no Jurisdiction upon the Statute of Usury 680

5. See, where their Orders are not void, but voidable 674

See also *Alehouses, Apprentices, Basters, Convictions, Poor, Orders, and Sessions.*

Justification.

1. A Wife may justify an Assault in Defence of her Husband; so may a Servant in Defence of his Master, but not *vice versa* 407

2. Nor can one justify in Defence of his House or Close, &c. but must plead *molliter Manus* Page 407

3. He that commands, or even requests another to take Goods, &c. is a Trespasser 409

4. And in Trespass such Command, &c. is traversable; *contra* in Replevin *ibid.*

5. In Trespass for taking Goods the Officer need only shew a Writ of Execution *ibid.*

6. *Secus* of a common Person, unless in Aid of the Officer by his Command *ibid.*

7. Where a principal Officer justifies under a returnable Writ, he must shew it was return'd; *secus* of subordinate Officers *ibid.*

8. A Serjeant at Mace justified under a Precept on a Plaintiff in Replevin, and held ill because not shewn it was return'd *ibid.*

9. In Imprisonment Justification by Order of Court of Conscience to carry the Plaintiff to the *Compter*, held ill, because the Imprisonment was confess'd, but not shewn to be in the *Compter* 408

10. Justification by 1 *El. c.* 17. held ill for want of shewing a Warrant 407

11. In justifying under a Writ 'tis not enough to shew where returnable, but must also shew whence it issu'd 517

See also *Bailiff, Replevin, and Trespass.*

K

King.

1. THE King has a Right to the Service of his Subjects 168

2. The King can't discharge the Right of a Subject, or hinder him of a Remedy the Law gives him 19

3. The Kings of *England* have not the sole Legislative Power, and if the King

The TABLE.

King and Clergy make a Canon, it does not bind Laymen without their Assent Page 412

4. The King can lay an Inibargo *pro bono publico* only 32

5. He can't grant an Annuity so as to charge his Person, but may charge his Revenues, as the Excise, &c. 58

6. He can't take Benefit of a Devise to superstitious Uses, but shall apply it to a charitable Use 163

7. In Grants by him, where it appears he intends to pass the Thing, it shall pass notwithstanding false Recitals 561

8. He need not bring a *Scire Facias* to revive a Judgment after the Year 603

9. He can't pardon Murder, except it be by express Words 499

10. He may pardon a Disability where it is only the Consequence of a Judgment; *aliter* where Part of the Judgment 689

11. He may create an *Irish* Peer under the Great Seal of *England* by express Words 510

12. After Institution and Induction a Presentation by the King is void, tho' it be *ad Corroborandum*, &c. 162

13. In conquered Countries such Laws are to take Place as the King pleases 412, 666

14. The King's Chaplain Extraordinary is not capable of a Plurality 161

15. And see touching the King's Chaplains Ordinary and Extraordinary 161, 162

See also *Monstrans de Droit*, *Offices* and *Office for the King*; and *Pardons*, *Parliament* and *Treason*.

L

Labourers, vide *Master* and *Servant*.

1

Laws, Common, Canon, Civil, &c.

1. **W**Here an uninhabited Country is found out and planted, all Laws in Force here are immediately so there Page 411

2. But where an inhabited Country is found and conquered, not so till declared by the Conqueror 411, 412 666

3. No Canons oblige the Laity without Consent of the Civil Legislature 412

4. The Islands *Guernsey*, *Fersey*, *Sarke*, &c. are govern'd by the Laws of *Normandy* 404

5. The Laws of *England* do not extend to *Virginia*, &c. being conquered Countries 411, 666

6. Where an Issue depends on Foreign Laws it may be tried in the next County, and such Laws given in Evidence 651

7. A Temporal Matter incident to a Spiritual Jurisdiction must be tried according to the Rule of the Common Law 547

8. See the Difference between the Maritime Law and Common Law, as to Hypothecations 34

9. And of *Lex Mercatoria*, vide *Bills of Exchange*, and p. 443, 125.

And *Lex Parliamenti*, vide 512.
See also *Villeins*, and p. 18.

Law-Cases denied, vide in *Fine Tabula*.

Leases.

1. A Lease for a Year, and so from Year to Year, *quandiu*, &c. is a Lease for two Years certain, and after at Will 413

2. When a Lessor or Lessee at Will may determine his Will, vide *bis* 413

3. Termor

The TABLE.

3. Termor for Years grants for a less Term to commence after his Death, 'tis good *Page 413*

4. A Parol Demise to hold from Year to Year, & *sic ultra quamdiu*, &c. is a Lease for two Years *414*

5. And after, every subsequent Year begun is not determinable till that be ended *ibid.*

6. And is not void by the Statute of Frauds *ibid.*

7. Leases of Copyhold Lands are void, and a Forfeiture *187, 537*

8. *Quare* of Leases in Possession, and Reversion *537*

9. For Bishops Leases, *vide Bishops*, &c. *189*

See also *Breach* 13. *Grants* 1, 2. and p. 244, 346, 588.

Legacy.

1. Where a Real Estate shall be charged with Legacies in Equity, *vide* *416*

2. A Legacy to a Creditor greater or lesser than his Debt, how to be taken *155, 508*

3. An Action lies for a Legacy devised out of Lands *415*

4. Estates *pur auter vie*, how far subject to the Payment of Legacies *464*

5. Where a Time is annex'd to the Legacy and not to the Payment, and the Legatee dies before the Time, 'tis a lapsed Legacy *415*

6. See a Prohibition to Spiritual Court on a Suit for a Legacy for refusing Proof of Payment, by one Witness *547*

See also *Assets*, *Executors* and *Devisees*.

Libellus Famosus.

1. The whole Libel need not be set forth in the Indictment, but if any

part qualifies the rest, it may be given in Evidence *Page 417*

2. Copying a Libel is criminal, and writing a Copy without Authority is writing a Libel *417, 419*

3. He that writes a Libel is the Contriver, and having a written Copy of a known Libel is Evidence of a Publication *418*

4. Where a Matter is unlawful in general, a general Allegation shall be so taken *ibid.*

Liberties, vide Franchises.

Limitations.

1. Defendant being beyond Sea, does not avoid the Statute of Limitations; *contra* of the Plaintiff *420*

2. And in Replication, to avoid that Statute, Continuances must be shewn *ibid.*

3. In Imprisonment, that Statute being pleaded to Part, the Plaintiff must reply, It was one continual Duress *ibid.*

4. Action removed by *Habeas Corpus*, and that Statute pleaded above, the Plaintiff may reply, the Suit below was within six Years *424*

5. Pleas of the Statute of Limitations are to be favoured *421*

6. Yet *Quare*, if the Statute be pleadable to Suit in the Admiralty for Mariners Wages *424*

7. Not guilty within six Years is ill in Trespass (being limited to four) *423, 424*

8. Where the Duty arises on Consideration Executory, the Defendant must plead, *quod Actio non accrevit*, &c. *422*

9. *A.* receives the Intestate's Money, and afterwards Administration is committed to *B.* the Cause of Action accrues by the Administration *421*

R

10. Twenty

The TABLE.

10. Twenty Years Possession is a good Title in Ejectment, for the Plaintiff as well as the Defendant *Page* 421

11. The Statute of Limitations runs not against *A.* unless actually ousted or disseised 423

12. *A.* barr'd in his Formedon may take Advantage of a Right of Entry 422

See also *Evidence* 1, 2, 3.

London and its Customs.

1. Court of Aldermen's Power concerning new Lights was only during rebuilding of the City 425

2. Custom to punish by Information in the Court of Aldermen for Assault and contemptuous Words of an Alderman in Execution of his Office, is good; *aliter* if to disfranchise *ibid.*

3. By Custom of *London* an Executor shall place the Testator's Apprentice with another Master, &c. 66

4. The Custom there concerning Freemen's Estates extends only to Children, not to Grandchildren 426

5. So the Custom of *Hotchpot* there; and where it appears under the Father's own Hand how much a Child has received, the Court will judge if a full Advancement or not *ibid.*

6. Mayor and Commonalty of *London* may limit Penalties of By-Laws to themselves, but cannot be sued for in the Mayor's Court 397, 398

7. See the Difference between *London* and other Cities, as to the Custom *Gilda Mercatoria* 204

See also *By-Laws, Corporations, &c.*

Lunatick and Ideot.

1. An Ideot is maintainable by the Parish where his Father is settled, and not where born 427

2. The Bond or other Deed of one *Non compos* is void 427, 675

3. A Prohibition to Probate of Will, on Suggestion of being *Non compos*, denied *Page* 552

4. Surrender of Tenant for Life being *Non compos*, to a Remainder-Man is void, &c. 576

See also *Infants.*

M

Maihem, vide Trespass.

Mandamus.

1. **A** *Mandamus* to one, to command another to do the Act, is ill 436, *vide* 701

2. Several Persons can't join in a *Mandamus* to restore 433, 436, 437

3. The Writ not to be tested before granted; but the *Alias* and *Pluries* may be returnable *immediate* 434

4. And fifteen Days between the *Teste* and Return if above forty Miles from *London*, and eight Days if under *ibid.*

5. And if the first Writ be not return'd, a peremptory Rule shall go, and next an Attachment, &c. 429

6. Also after the Return falsified, a peremptory *Mandamus* is of Right 430

7. Yet if Action be brought for such false Return in *C. B.* no peremptory *Mandamus* shall go 428

8. Where an Officer at Will is remov'd, and the Corporation does not rely on their Power, but return a Misdemeanor, and that is insufficient, a peremptory *Mandamus* shall go 428, 435

9. Want of Summons is no Objection for Removal, if the Party appeared and was heard 428, 435

10. A Custom to remove *ad libitum* is good, but that must be return'd positively 430

11. A

The TABLE.

11. A Return of a *Mandamus* must be certain to every Intent Page 432

12. Several Matters may be returned on the same Writ, but they must be consistent 436

13. A Variance between the Writ and Return in the Name of the Corporation is ill 434

14. A *Mandamus* directed to the Mayor, Bailiffs, &c. the Mayor alone may make the Return, and the others can't disavow 431, vide 701

15. But the Mayor is punishable if he does it against the Consent of the Majority 431, 432

16. Where the Return speaks of a Constitution different from the Writ, it ought to deny the Supposal of the Writ 431

17. Return of a Resignation in the corporate Assembly, and Election of another into the Office, is good 433

18. But *non fuit debito modo Electus* is not good, unless the Writ suggests a *Debito Modo* 433, 434

19. An Amotion or Removal must be for the Matter charg'd 435

20. Non-attendance is a good Cause of Forfeiture of the Office of Recorder *ibid.*

21. A Rule to inspect the Charter in order to make a Return, denied 430

22. Concerning *Mandamus's* for Overseers of the Poor, to make Rates or come to Account, vide 525, 531

See also *Distribution, Motion, 2. and Writs.*

Manor, vide Copyhold.

Markets, vide Fairs.

Marriages, vide Baron and Feme, and Page 437.

Mariners, vide Admiralty.

Marshal and Marshalsea.

1. A Bond to the Marshal to be a true Prisoner is good Page 438

2. The Earl Marshal of *England* formerly Marshal of *B. R.* 439

3. See the Jurisdiction of the Palace-Court *ibid.*

4. Debt lies not in the *Marshalsea* on a Judgment in *B. R.* *ibid.*

5. The Office of Chamberlain of the *King's Bench* Prison inseparably incident to that of Marshal *ibid.*

6. All other *Marshalseas* originally deriv'd from that of the Earl Marshal of *England* 439, 602

See also *Escape 2.*

Master and Servant.

1. Master is liable for Neglect of his Servant, not the wilful Wrong 441

2. And he that employs a Servant undertakes for him 440

3. Yet the Servant's Act binds not the Master, unless he acts by his Authority, or he consents 442

4. Goods are spoiled by Default of a Master of a Ship employed by the Owners, the Owners are liable 440

5. But the Action must be brought against all the Part-Owners, who make but one Master *ibid.*

6. The Servant may justify Battery in Defence of his Master, but not *à converso* 407

7. If a Servant be robbed of his Master's Money or Goods, he or the Master may sue the Hundred 613, 614

8. A Master of a Stage-Coach is liable for Goods lost by his Driver, if he takes a Price for Carriage; *aliter* not 282

9. A Covenant between the Master and a third Person, the Servant not being Party (*vide Apprentices*) 479

10. Order by Justices for Payment of Servants Wages, if it does not appear

The T A B L E.

pear what Wages, shall be intended Husbandry Page 442, 484

11. So Order to pay 42 s. for Labour in Husbandry held good, tho' it does not appear such Wages as the Statute directs 441

12. For Remedies for Wages are favoured in the Superior Courts 441, 479, 484

13. See the Distinction between *Servus prædialis* and *personalis* 667
See also *Apprentices*, and *Authority*.

Maxims.

1. *Omnis innovatio plus novitate perturbat quam utilitate prodest* 20

2. *Sic utere tuo ut alienum non lædas* 22

† *Communis error facit jus* 33

3. *Volenti non fit injuria* *ibid.*

4. *Quicumq; habet ordinariam jurisdictionem est loci illius ordinarius* 41

5. *Annua nec debitum judex non separat ipsum* 65

6. *Id certum est quod certum reddi potest* 75

7. *Non est justum aliquem post mortem facere bastardum* 121

8. *Ex nudo pacto non oritur actio* (*vide* 24.) 129

9. *Par in parem imperium non habet* 135

10. *Nulla curia quæ recordum non habet potest mandare carceri* 200

11. *Actio pro injuria personali moritur cum persona*, (*vid.* 12.) 210, 314

12. *Placitum est nomen collectivum*, *Q* 219

13. *Expressio eorum quæ tacite insunt nihil operatur* 233

14. *Nemo bis punietur pro uno delicto* 253

15. *Qui sentit onus sentire debet & commodum* 302

16. *Utile per inutile non vitiatur* 417

17. *Utlagatus non convictus est de Facto, &c.* 494

18. *Res est misera ubi jus est vagum* Page 512

19. *Qui facit per alium facit per se* 589

Measures, vide Weights.

Melius Inquirendum, vide *Coroner* and *Office for the King*.

Merchants and Merchandize.

1. The Word *Merchant* includes all Sorts of Traders, as well as Merchant-Adventurers 445

2. And the drawing a Bill of Exchange makes a Merchant to that Purpose 125

3. Between joint Merchants the Remedy survives, but not the Duty 444

4. Therefore the Survivor and the Executor can't join in an Action *ibid.*

5. In Policies warranted to depart with Convoy, is intended without wilful Default of the Master 443

6. And intended only from the Place of having Convoy *ibid.*

7. And Deviation discharges the Policy for that Time, &c. 444, 445

8. *Quære* if a Ship seized by the Government be within the Word *Detention* in the Policy 444

9. A Policy altered by Consent after it was underwritten, yet good *ibid.*

10. Goods spoiled by Default of the Master, the Owners liable 440

See also *Admiralty*.

Misfeasance, &c. vide *Actions on the Case*, 2, &c.

Misnomer, vid. *Abatement*, *Addition*, *Names*, and *Variance*.

Modus Decimandi, vide *Tithes*.

Money.

1. Any Piece of Money coin'd at the Mint is of Value as it bears Proportion

The TABLE.

portion to other current Money, and that without the King's Proclamation

Page 446

2. The *Unite* being raised 16 *d.* by King *James* the I. was the Occasion of coining Guineas, *viz.* at 20 *s.* *ibid.*

3. In *Indeb' Assump'* to pay 13 *l.* 10 *s.* for Nine Guineas receiv'd, not necessary to shew the Number of Guineas

(*vide* 9, 22.) *ibid.*

4. Money paid on a void Award may be pleaded as Accord and Satisfaction

71

5. *A.* receives Money of *B.* by the Hands of *C.* 'tis *A.*'s Money, and he must abide by the Loss

507

6. A Power to charge Lands with a Sum of Money imports the Interest thereof also

538

7. Touching bringing Money into Court, *vide*

583, 596, 597

See also *Assumpsit*, *Rules of Court*, and *Tender*, &c.

Monopolies.

See the Construction of the Statute 21 *Jac.* 1. *c.* 3. of Monopolies and of new Inventions

447

Monstrans de Droit.

1. If the Plaintiff therein fails in his own Title, he can't take Advantage of another's, or want of Title in the Crown

447

2. The Record of the Inquisition thereon is before the Court with respect to the Plaintiff only

448

3. And see the Judgment therein *ib.*

See also *Page*

395

Mortgages.

1. A Mortgage with Proviso, That future Interest, if not paid, shall be taken as Principal and bear Interest, the Proviso is void

449

2. A Mortgagee or Purchaser precedent, tho' by defective Conveyance,

shall be preferr'd before Assignees of Commissioners of Bankrupts

Page 449

3. Where personal Estate shall be applied to pay off a Mortgage in Discharge of the Lands

449, 450

4. See also *Chancery*, 19, 20, &c. and *Disseisin*, 1 and 2.

Motion.

1. No Motion to quash Indictments removed by *Certiorari* after the Recognizance for Trying is forfeited

380

2. No Motion for peremptory *Man-damus* after Verdict for false Return, till four Days after the *Ret'* of the *Postea*

431

3. If a Plaintiff moves to amend his Declaration the same Term the Plea comes in, he need not give new Rules to plead

520

4. No Motion for a new Trial after Motion in Arrest of Judgment

647

5. Where a *Sci' Fa'* shall issue on Motion, and where without, *vide*

598

6. A Franchise not to be allow'd on Motion, unless formerly pleaded, and is upon Record

450

7. Where a Fine is set for Forcible Entry, the Conviction not to be quashed on Motion

ibid.

8. See where a *Venue* may be changed on Motion, in *Barrister* and *Visne*.

9. How to move to make a Record a *Concilium*

565

Murder, *vide* *Appeal*, *Felony*, and *Page* 614.

N

Names of Purchase and Dignity.

1. **A** Duke's eldest Son is not to be styled by his Father's second Title in legal Proceedings, tho' allowed him in common Parlane

451

S

2. A

The TABLE.

2. A Corporation may sue by their Name of Incorporation, tho' they have exprefs Power to sue by another
Page 451

3. A Variance between the Writ and Return of a *Mandamus* in the Name of the Corporation is ill 434,
vide 433

4. A Bond made by the Name of *Erlin*, but subscribed *Erlwin*, is no material Variance 462

5. On *Certiorari* to remove Orders, the Name of the Parish in the Writ and that in the Order must be the same 452

6. If a Writ or Declaration be against one as Knight only, when he is a Knight and Baronet, 'tis a Misnomer 50

See also *Abatement*, *Additions* and *Variance*.

Ne exeat Regnum, vide *Writs*.

Negroes, vide *Villeins*.

Nisi prius.

1. The Authority of a Judge of *Nisi prius* is by Commission of Assise 454

2. A Judge of *Nisi prius* may receive a Nonsuit at the Assises 456

See also *Abatement*, 17. *Amendment*, 14, 16, &c. and *Arrest of Judgment*.

Nobility, vide *Peers*.

Nolle Prosequi, vide *Nonsuit*.

Non Compos, vide *Lunatick*.

Nonsuit.

1. In Trespass against four there can be but one Nonsuit for want of declaring 455

2. A *Non pros* may be entred as to one Defendant after Interlocutory Judgment, not after Final Page 455

3. Where a Defendant files Bail without an Arrest, the Plaintiff may be *Non pros'd* *ibid.*

4. In a *Quare Impedit* Nonsuit after Appearance is peremptory 559

5. So it seems in Appeal: But Nonsuit therein before Appearance is not peremptory 64

6. In Ejectment against several, if some confess *Lease*, &c. and others not, the Plaintiff may proceed as to the former, and be Nonsuit as to the latter 456

7. Where several Defendants sever in Plea, Plaintiffs may enter *Non pros* against one, any Time before the Record sent down 457

8. A Discharge by *Nolle prosequi* on Indictment, will not maintain an Action for a malicious Prosecution 456

9. See the Forms of entring *Non pros* *ibid.*

Notice.

1. Notice is not necessary to be alleged where the Matter is presumed to be known without it 457

2. As where *A.* in Consideration *B.* would deliver up a Bond to *C.* assumes to pay *B.* 30*l.* Action lies on *B.*'s delivering up the Bond to *C.* sans alleging Notice to *A.* of such Delivery; because intended *ibid.*

3. Where and what Notice is necessary or not, in order to make a Settlement 472, 473, 476

4. Where one is bound by Deed to do an Act of which he is to give Notice, tho' such Notice is dispensed with by becoming impossible, yet the Act must be done 214

5. If there be no actual Proceeding within four Terms, there must be a Term's Notice of Trial 557

6. See

The TABLE.

6. See more concerning Notice of Trial, &c. Page 257, 645, 650, 653

See also *Request*.

Novel Assignment.

1. Where the Defendant by Plea makes a transitory Trespass local, the Plaintiff may make a new Assignment 453

2. Where the Place is made material by the Defendant's Plea, he must shew it with Certainty *ibid.*

3. If in Trespass, *Quare Clausum fregit*, he pleads *Liberum Tenementum*, and Issue thereon, he may shew any Close that is his Freehold *ibid.*

4. But if the Plaintiff gives the Close a Name, the Defendant must prove a Freehold in the Close so named *ibid.*

Nudum Pactum, vide Assumpsit.

Nuisance.

1. If one erects a House which stops my Lights I may pull it down 459

2. In Case for stopping Lights it must appear that the Lights were ancient *ibid.*

3. And *Consuevit* after Verdict there- in imports Time out of Mind *ibid.*

4. Tenant for Years erects a Nuisance, and makes an Under-Lease to B. Action against either 460

5. A *Quod permittat prostertere quadam Aedificia ad nocumentum*, &c. lies 458

6. In Justification of abating a Nuisance it need not be shewn, That he did it doing as little Hurt as could be 458, 459

7. Keeping Swine in a City, a Nuisance at Common Law, and indictable 460

O

Oaths and Affidavits.

1. SEE the Oath of the Triers of Jurors on a Challenge for Favour, &c. Page 152

2. Oath made *de Veritate premissorum* is insufficient in Convictions 369

3. Concerning the taking of Oaths to qualify for Offices in Corporations 428, 429

4. Where a Peer shall depose on his Oath or his Honour 512, 513

5. One robb'd, if he refuses to take the Oath, can't sue the Hundred 613

6. Affidavit of the Time when a Declaration was delivered 670

7. On Submission to a Fine after confessing an Indictment, Affidavits may be read to prove the Prosecutor assaulted first; *contra* after a Conviction 55

8. Affidavits taken before Commissioners, by 29 Car. 2. c. 5. must be in a Cause in Court 461

9. Where Affidavits of Persons pil- lory'd may be read *ibid.*

10. Where on shewing Cause new Affidavits may be read to support a Rule *ibid.*

Obligation.

1. Insensible Words in the Sum of an Obligation may be explain'd by the Condition 462

2. As *Sex triginta Libris*, or *Quadrans Libris*, &c. *ibid.*

3. Condition of a Bond (reciting a Debt) *not to pay*, is repugnant, and the Bond single 463

4. Bond made by *Erlin* and sub- scribed *Erlwin*, is no material Va- riance 462

5. Bond from A. and B. to H. joint and several, a Covenant from H. not to sue is no Defeasance 575

6. A

The TABLE.

6. A Bond by a Deputy to pay a certain Sum out of his Salary or Profits is good *Page 466, 468*

7. But where it is without Relation to the Salary or Profits, 'tis void *ibid.*
See also *Day, Date and Chancery.*

Occupant and Occupancy.

1. The Heir shall be charged in the Case of a special Occupancy with Payment of Debts, not Legacies 464
2. An Administrator shall be charged in like manner where he is a special Occupant 465

Offices and Officers.

1. A Judicial Office may be granted to two, but if one dies it does not survive, unless said, *To the Survivor* 465
2. The King grants an Office to *A.* *durante beneplacito*, and after grants it to *B.* to commence after the Death, Surrender or Forfeiture of *A.* the latter Grant is good *ibid.*
3. Office granted at Will is at the Will of the King, and not of the Party, and may be surrendered 466
4. King's Tenant at Will may forfeit; but there must be an Inquisition *ibid.*
5. Non-attendance a good Cause of Forfeiture of the Office of Recorder 435
6. Of removing Officers at Will in Corporations, *vide Mandamus* 8. and p. 428.
7. A Freehold to commence *in futuro* may be in a Rent *de novo*, or in an Office 466
8. Bond by a Deputy to pay Half the Profits of the Office, or a certain Sum out of the Salary, &c. is good *ibid.* and 468
9. Earl, Marshal of *England* formerly Marshal of *B.R.* and the Office

of *Chamberlain* of the Prison incident to that of Marshal *Page 439*

10. The *Custos Rotulorum* may appoint the Clerk of the Peace without Deed 467, *vide 479*

11. Concerning the Office of Clerk of Assize, *vide 670, 571.* and Clerk of the Market 327

12. A Parish-Clerk nominated by the Parson is in for Life, &c. 536

13. And Case lies for disturbing him in the Execution of his Office 468

14. The Mayor is the Head of the Corporation 398, 432

See also *Bailiff, Constable, Coroner, Fees, Mandamus, Marshal, Judge, Sheriff, &c.*

Office for the King.

1. An Inquisition finding some Points well, and nothing as to others, may be supplied by a *Melius Inquirendum* 469
2. *Contra* where it is defective in the Points found *ibid.*
3. *A.* Tenant for Life, Remainder to *B.* in Fee; *A.* is attainted, the King seizes, *B.* may enter on the King *ibid.*
4. *Aliter* if an Office had found *A.* seised in Fee, &c. *ibid.*
See *Monstrans de Droit.*

Orders of Justices of the Peace.

1. Order by Justices residing in the County, not enough, *sans* saying of or for the County 474
2. Order for Removal need not be by Justices of the Division, but must be *Quorum unus*, *vide bis* 473, 480
3. Justices can't command the Officers of the Parish whither *H.* is sent, to remove him 493
4. On Orders of Removal the Examination must be by both Justices, *Quorum unus* 488, 489
5. Order to remove one to *B.* because the Father last settled there, is ill 470
6. So

The T A B L E.

- | | |
|--|---|
| <p>6. So to remove <i>A. and his Family</i>, or <i>Wife and Family</i>, because too general Page 482, 485, 488</p> <p>7. So an Order reciting, <i>We are informed B. is the Place of legal Settlement</i>, is ill 473</p> <p>8. Also there must be a direct Adjudication of the Place of legal Settlement 478, 479</p> <p>9. Order made on <i>Complaint that A. is likely to be chargeable</i>, is not good without an Adjudication 491</p> <p>10. And such Order must be made on Complaint of the Churchwardens (Q.) 492, 493</p> <p>11. But need not shew that he did not rent a Tenement of 10 l. per Ann. <i>ibid.</i></p> <p>12. Order of two Justices not appealed from binds the Parish upon which 'tis made, till a new Settlement is gained 488, 489</p> <p>13. And <i>held</i>, an Order of two Justices binds against all Parishes till repealed 481, vide 524, 527</p> <p>14. Yet an Order of Reversal on Appeal binds not a third Parish nor Party 486</p> <p>15. Where Justices may remove to or from Extraparochial Places, <i>vide</i> 486, 487</p> <p>16. The Parish on whom an original Order is made can't remove till it be reversed 488</p> <p>17. And the Sessions on Appeal can't send to a third Place not Party 475</p> <p>18. Nor can the Sessions after their first Order make an Order of Review (<i>vide Sessions</i>) 477</p> <p>19. And an Appeal from Order of Corporation Justices must be to the Sessions of the County, not of the Corporation 490</p> <p>20. The first Order failing all subsequent Orders fall to the Ground 482</p> <p>21. After Order confirm'd on Appeal, if a Person goes to a Parish not Party, he must be remov'd by original Order 481</p> | <p>22. <i>Note</i>; An Order reversed is final only between the Parties; but if confirm'd, or not appeal'd from, 'tis final to all the World Page 492, 524, 527</p> <p>23. Justices may order the last Overseers to pay their Successors what Money is in their Hands 484</p> <p>24. They may order Wages to be paid generally, and the Court will intend it for Husbandry 442, 477, 484</p> <p>25. Order for Maintenance of a poor Child dropp'd in <i>Christ-Church Hospital</i>, quash'd 485</p> <p>26. Payment of Parish-Rates, either for House or Person, makes a Settlement 478</p> <p>27. Where and what Notice on other Accounts is necessary to make a Settlement 472, 473, 476, and vide Poor.</p> <p>28. On <i>Certiorari</i> the Justices can only return the Order <i>in hac verba</i> 493</p> <p>29. Defect of an Order can't be made good by Matter alledged in the Return <i>ibid.</i></p> <p>30. See an Order by two Justices to execute another Order made by others, not good 489</p> <p style="text-align: center;">See also <i>Apprentices, Bastards, Certiorari, Justices of the Peace, Poor, and Sessions.</i></p> <p style="text-align: center;">Ordinary, vide Administration, and Presentation.</p> <p style="text-align: center;">Outlawry.</p> <p>1. <i>A.</i> indebted to <i>B.</i> on a Judgment, and to <i>C.</i> on Bond, is outlawed at the Suit of <i>C.</i> and his Lands seized, the Outlawry shall be preferr'd before the Judgment (except Fraud shewn) 495</p> <p>2. One outlaw'd for a Misdemeanor only, can't be thereon fined for the Fact 494</p> <p>3. Where the Plaintiff is allowed to reverse it at his own Charge, and the Difference <i>inter B. R. and C. B.</i> herein 495</p> <p style="text-align: center;">T 4. De-</p> |
|--|---|

The TABLE.

4. Defendant need not appear in Person to reverse it, except in Treason or Felony Page 496

5. If one comes in or appears *gratis*, he may reverse it without Bail; *aliter* if by *Cepi Corpus* *ibid.*

6. If two are outlaw'd, Error to reverse it must be in the Name of both *ibid.*

7. But one of them may be summoned and severed, and then it shall be only for his Benefit that appeared *ibid.*

8. On Error to reverse Outlawry for Felony, if there be Lands a *Sci' Fa'* must issue 495

9. But if the Attorney General confess on Record, there are none, no *Sci' Fa'* is necessary *ibid.*

10. See Outlawry on Mesne Process does not make the Debt *Lien* on the Land 80

Orphans, vide London.

Overseers, vide Poor.

Oyer and Shewing of Deeds, &c.

1. Want of *Profert*, &c. is only Form, and cured by Verdict 497

2. And upon *Profert* made unnecessary *Oyer* shall not be given *ibid.*

3. Variance between the Writ and Count not pleadable without praying *Oyer* of the Writ 658

4. A negative Plea need not conclude *prout patet*, &c. (*vide p. 1.*) 520

5. Where Letters Patent must be pleaded with a *Profert* or not 497

6. A Deed remains in Court all the Term 'tis produced; *aliter* of Letters Testamentary or Administrations *ib.*

7. Where one is bound to make a Deed, he must set it forth particularly 498

8. Defendant demands *Oyer* of a Deed indented, which he himself ought to set forth, and the Plaintiff

gives *Oyer* but imperfectly; 'tis at the Defendant's Peril Page 498

9. Denial of *Oyer* where it ought to be granted is Error *ibid.*

10. *Aliter*, of granting it where it ought not *ibid.*

P

Palatine Counties of Chester, &c.

1. **N**O Chief Justice of Chester till *Q. Elizabeth's* Time, because only one Justice 501

2. No Outlawries in Chester till *H. 8. c. 13.* For Coroners there were introduced by that Statute *ibid.*

3. Error lies to reverse a Fine there 500

4. A *Habeas Corpus* lies not to the County Palatine of Chester 354

Parceners, V. Jointenants, &c.

Pardon.

1. The King may pardon Murder by express Words 499

2. A Pardon for Murder not to be allowed without Writ of Allowance certifying Sureties taken for the Peace *ibid.*

3. One pardoned shall not be charged in Custody with Civil Actions 500

4. 'Tho' Fine for a Nuisance is pardoned by general Pardon, yet the Abatement not excused 458

5. What Disabilities the King may pardon, &c. *vide King and Perjury.*

Parish, Town, Vill, &c.

1. A Parish *prima facie* intends a Vill; and so if a Place be nam'd generally 501

2. What will bring a reputed Parish within 43 *Eliz.* for Poor's Rates, &c. *vide Poor* and 501

3. A

The TABLE.

3. A Constable may be chosen in a Town or Corporation by Custom Page 501

See also *Visne.*

Parish-Clerk, vide Officers.

Parliament.

1. An Act of Parliament does not extend to *Ireland* unless expressly named 510

2. The Judicial Power of Parliament is in the Peers, but the Judgment is virtually the King's *ibid.*

3. The House of Peers have a double Authority, but no original Jurisdiction 511

4. They can't deprive of Peerage, and their Judgment must be formal, &c. 510, 511

5. See touching the *Lex Parliamenti*; and that Inheritances not originally determinable there 512

6. See the several Kinds of Right of electing Members of Parliament 20, 21

7. Action lies not for refusing to receive his Vote in the Election of Members, *per 3 contra Holt* 19

8. And no Action lies at Common Law for a false Return, unless where the Right is determined, or cannot be determined in Parliament 502

9. But an Action for false Return lies on the Statute 7 & 8 W. 3. 504

10. The King's Courts may judge of Parliamentary Matters incidently 503

11. On Commitments by the House of Commons for Privilege, no Court can deliver on a *Habeas Corpus*, *per 3 contra Holt* 503

12. Filing and continuing an Original, no Breach of Privilege 504

13. And the Authority of the House of Commons is circumscribed by Law *ibid.*

See also *Peers.*

Parson, Vicar, and Curate.

A Curate is removable at the Will of the Parson Page 506

See also *Chaplain* and *Presentation.*

Partition, vide Apportionment.

Patents.

1. A new Charter may be used as a new Grant, or as a Confirmation 168

2. Where Patents must be shewn with a *Profert, &c.* or their Exemplification 497

3. Where the thing intended shall pass by the Patent notwithstanding false Recitals, &c. 561

4. A Grant to a Knight by the Name of Esquire is void 560, 561

5. A Peer of *Ireland* may be created under the Great Seal of *England* 510

6. When a Patentee is disturbed of his Dignity, how to proceed 511

7. Of Dignities created by Patent, *vide* 509

See also *Surrender* 5.

Pauper.

1. A *Pauper* shall pay Costs of Nonsuit or be whipp'd (*sed Q.*) *per Holt* 506

2. If he gives Notice of a Trial, and does not proceed, he shall be dispaupered *ibid.*

3. *Quere,* If one, whose Estate is mortgaged for more than its Value, may be dispaupered 507

Pawns, vide Pledges.

Payment and Satisfaction.

1. An Executor may pay Debts of a higher Nature after a Decree *Quod computet* 507

2. But

The TABLE.

2. But *aliter* after a final Decree, for such Decree is in Nature of a Judgment Page 507

3. *A.* receives Money of *B.* by the Hands of *C.* 'tis *A.*'s Money, and he must bear the Loss by *C.* *ibid.* 508

4. So if *A.* receives Part of a Sum and puts it into a Bag, and while counting the Residue the Bag is stolen, &c. *ibid.*

5. Payment to a Bond with Condition indorsed is a good Plea before Breach *ibid.*

6. But not after Breach, for the Benefit of the Condition is lost by the Breach *ibid.*

7. Payment of Part and Acquittance pleaded *puis darrein Continuance* is in Bar 519

8. Money paid on a void Award may be pleaded as Accord and Satisfaction 71

See also *Debt, Executors, Legacy, Money, and Tender.*

Peculiars, vide Administrator.

Peers of the Realm.

1. An Earl's Title allow'd at Law, tho' it had been disallow'd by the Lords in Parliament 509, 512

2. Of the Creation, Office, and Possessions of Earls and Barons 509

3. An *Irish* Peer may be created under the Great Seal of *England* 509, 510

4. The Place of an Earl's Title is not material nor necessary to be in *England*, or any where 510

5. See the Difference of pleading and trying Peerage by Writ, from Peerage by Patent *ibid.*

6. House of Lords can't deprive of Peerage by Patent *ibid.*

7. The Judicial Power of Parliament is in the Peers, but 'tis virtually the Judgment of the King *ibid.*

8. House of Peers has a double Authority (Legislative and Judicial) Page 511

9. But they have no original Jurisdiction, for all Jurisdiction is from the Crown 510, 511

10. Error lies not from the Exchequer-Court to the House of Peers 511

11. Their Judgments must be complete and formal, and a Dismission is no Judgment 511, 512

12. How to proceed where a Pater-tee is disturbed of Dignity, *vide* 511

13. Inheritances not originally triable in Parliament 512

14. One arrested by the Name of a Commoner, the Court won't on Motion try whether Peer or not *ibid.*

15. Where a Peer shall depose on his Oath or Honour *ibid.*

See also *Names and Parliament.*

Pension, vide Annuity.

Perjury.

1. Perjury may be given in Evidence to the Credit of a Witness 514

2. But a Man ought not to be drawn into a constructive Perjury *ibid.*

3. The Charge thereof ought to be equally certain, whether at Common Law or on the Statute *ibid.*

4. Yet on Conviction thereof on the Statute, Disability is Part of the Judgment *ibid.*

5. But on a Conviction at Common Law, Disability is only the Consequence of the Judgment *ibid.*

6. And the King may pardon a Disability where only the Consequence of a Judgment 687

7. But not where Part of the Judgment; yet a Statute will pardon both *ibid.*

See also *Indictments.*

Pleas

The TABLE.

Pleas and Pleadings.

1. *Placitum est nomen collectivum* Page 219
2. On a *Habeas Corpus* returnable in *Mich.* Term, if the Declaration be delivered before *Craf. Animar.* the Defendant must plead to try, but on a *Cepi Corp.* he is only to plead to enter 515
3. And so in *Easter* Term, if the Declaration be delivered before *Mens. Pasc. &c.* *ibid. vide* 518
4. On Informations in *Middlesex* the Defendant has the whole Term to plead 514
5. But if laid in the Country, he shall have Time till the following Term *ibid.*
6. To a Declaration delivered against one in Custody, he shall have the whole Term to plead in Abatement 515
7. But upon filing Bills against Officers and Clerks, 'tis sufficient if there be four Days within Term to plead 517
8. And note, *Sundays* and *Holy-days* are to be reckon'd as well as the Day of filing the Bill *ibid.*
9. No new Rules to plead after an Amendment, unless an Imparlance be given 517
10. Pleas in Abatement, as *Misnomer, &c.* not pleadable after Imparlance 518
11. After the Bail-Bond forfeited, the Defendant can't plead in Abatement of the original Action 519
12. When and how a Defendant shall plead after a voluntary Appearance on a *Cepi* return'd 518
13. If Judgment in Ejectment be sign'd for want of a Plea, in a Country-Cause, but no Possession deliver'd,

the Plaintiff may be compelled to accept of a Plea; *contra* if Possession delivered Page 516

14. A Judgment may be set aside, tho' strictly regular, in order to try the Merits 518

15. Before Joinder in Demurrer, the Defendant may wave his special Plea, and plead the General Issue 515

16. *Contra* where a Rule is to plead, so as to stand by it, and he pleads specially, and the Plaintiff demurs *ibid.*

17. The Court will never order a Man to plead peremptorily, till the Rules for pleading are out 516

18. Nothing can be taken Advantage of on a Plea over, which could not on a General Demurrer 519

19. 'Tis against the Duty of Counsel, and the Stat. *West. 1. c. 29.* to sign frivolous sham Pleas 517

20. An Attorney can't be compelled to swear his Plea, but where 'tis a Foreign Plea 515

21. But if he put in a false or frivolous Plea in Deceit of the Court, he may be fined 515, 516

22. A Parol Award may be pleaded, *ready to be delivered*, and Parol Uses averred 75, 676

23. Several Bars may be pleaded to several Parcels of a Debt on Bond 180

24. But one Defendant can't plead two Pleas that go to the whole 218

25. A Plea to the Jurisdiction is well in the Negative, and *venit & dicit*, or *dicit* only, a good Defence 30, 543, 544

26. Tho' the Bond of an Infant, or *Non Compos* is void, yet they can't plead *Non est factum* 427, 675

27. *Testatum existit* is no Averment, and only Recital 515

28. *Onerari non debet* is proper only where there never was a Charge 516

U

29. In

The TABLE.

29. In Debt on a Judgment the Declaration may be *sans prout patet per Recordum* Page 565

30. A negative Plea need not conclude *prout patet per Recordum* 520

31. And if a Record be pleaded, tho' no such Conclusion, yet the other may reply *Nul tiel Record* *ibid.*

32. Where the Plea is in Abatement, the Replication must conclude to the Country 2

33. But to a Plea in Bar, it must conclude *& hoc paratus est verificare* 2, *vide* 629

34. In Replevin, *Prisel in auter lieu*, must not conclude *petit Judicium & Retorn*, &c. 3

35. Plea of taking by Distress does not confess Property 640

36. In Trespass, &c. justifying under a Writ, is not enough to shew where returnable *sans* shewing whence it issued 517, *vide* 545

37. *Performance* must be pleaded in the very Words of the Condition; *aliter* of an Excuse 520

38. A Plea on the Statute for Discharge of poor Prisoners ought to shew all the Qualifications and Circumstances to bring a Defendant within the Act 521

39. Where a Statute creates a new thing in Writing, it must be so pleaded; but where it only adds it to a Common Law Matter, it need not 510

40. Where a Plea shall conclude with a *Profert*, &c. 73 *bis* 545, 584

41. A Plea delivered as an *Escrow* must conclude to the Country 274

42. Where *Tertenants* may not join in a Plea to *Sci' Fa'* 601

43. Difference in pleading *Seisin* between Tenants in common and *Parceners* 630

See also *Abatement*, *Amendment*, *Continuance*, *Esoppel*, *Demurrer*, *Departure*, *Jeofails*, *Imparlance*,

Limitations, *Misnomer*, *Payment*, *Privilege*, *Records*, *Repleader*, *Tender*, *Traverse* and *Variance*.

Pledge and Bailment.

See of *Pawnbrokers* and *Pawns*, and how *Pawns* are to be demeaned Page 522, 523

Policies of Insurance, vide Merchants.

Poor, Poor's Rates, Vagrants, &c.

1. There are two Ways, by 43 *Eliz.* to make one Parish contributory to the Poor of another 481

2. And touching such Orders for such Contribution *vide* 480

3. Where and what Notice is necessary or not, to make a Settlement, *vide* 472, 473, 476, 523, 524

4. What Payment of Parish-Rates make a Settlement 478

5. Renting a Mill of 10*l.* per *Ann.* makes a Settlement 536

6. So a Parish-Clerk nominated by the Parson *ibid.*

7. Having Lands in a Parish does not, but living there and having Lands does, without Notice 524

8. Taxation without Payment does not 523, *vide* 534

9. For nothing makes a Settlement within 3 & 4 *W. & M.* that is not within the very Words 534

10. An Apprentice may gain a Settlement, tho' the Master has none 533

11. A Lunatick is to be settled with the Father, not where born 427

12. A Bastard born at *A.* pending an illegal Order of Removal from *B.* is to be settled at *B.* 121, 474, 532

The TABLE.

13. A Vagrant is to be sent to the Place of Birth, and thence by Order to his Place of Settlement Page 526

14. An unmarried Person hired for a Year, and marrying before 'tis expired, can't be remov'd 527

15. And if he performs his Service, gains a Settlement, notwithstanding his Marriage 527, 529

16. Two several Hirings for half a Year, tho' Service for a whole Year, makes no Settlement 535

17. The Father settled at *A.* removes to *B.* with his Children, and gains a new Settlement there; the Children thereby gain the same, tho' under the Age of seven Years 528

18. A Certificate-Man is not removeable till actually chargeable, and the Order of Removal must so adjudge him 532

19. And a Certificate concludes the Parish giving it, as to all the World 535. *sed vide contra* 530

20. A standing Rate for the Poor can't be made, for 'tis variable by Circumstances 526, 531

21. And Justices may quash the whole Rate, where unequal, and make or order a new one 524

22. Rates and Assessments for the Poor ought to be raised Monthly, &c. 531, 532

23. Hospital Lands are chargeable to the Poor 527

24. No *Mandamus* lies to the Overseers, to make a Rate to reimburse the former Overseers 531

25. A *Mandamus* to compel precedent Overseers, to account with the present, quash'd 525

26. Upon Appeal from Allowance of Overseer's Accounts, Sessions must execute their Judgment, in the same Manner as two Justices ought to do 533

See also *Apprentices, Bastards, Orders of Justices and Sessions.*

Powers, &c.

1. Power to demise Lands, except the Demesne Lands of the Manor; Copyholds are within the Exception Page 537

2. Power to charge Lands with a Sum of Money, imports the Interest thereof also 538

3. See the Difference of a Power appendant to the Estate, and collateral to it 239, 240

4. Power to examine, hear and punish, is a judicial Power 200

Court having Power to fine and imprison is a Court of Record *ibid.*

5. Power of Election in one Body Corporate, and Approbation in another 436

6. Justices Power to discharge Apprentices, extends only to such Trades as are mention'd in the Statute 471

7. Whatever is to take Effect out of an Authority, or by way of Appointment, is good without Deed 467

See also *Authority.*

Prerogative, vide King and Presentation.

Prescription.

1. How a Prescription may be laid in *Tenentes & occupatores* 316

2. Where the Charge is on the Defendant of common Right, the Plaintiff need not prescribe in his Declaration 22

3. But where a Charge against common Right is laid on the Owner of the Soil, the Plaintiff must make a Title, and a Prescription is sufficient 335
vide 538

4. Where and how one that has a prescriptive Right may sue in the Spiritual Court 551

See also *Tithes.*

Presentation.

The TABLE.

Presentation, &c.

1. Presentation, Admission, Institution and Induction, are requisite to compleat a Parson Page 137
2. After Institution and Induction, a Presentation by the King is void 162
3. The Ordinary may examine and refuse, but it must be in convenient Time 539
4. And where he refuses, *quia insufficiens in Literatura*, he must shew in what Particular; else 'tis too general ibid. 540
5. Also he must give Notice of his Refusal, if it be *quia Illiteratus*; *aliter* if *quia Criminosus* ibid.
6. The Ordinary may refuse as unfit for this, tho' he had allowed him fit for a former Cure ibid.
7. A Presentation may destroy an Impropriation, but not a Donative 541
8. Before the Reformation the Pope presented on Promotion of the Incumbent, and now the King 504
9. Where a new Advowson is created by Statute, 'tis subject to the same Rules of Law and Prerogative of the Crown as an old one 504
10. In Case of a Prerogative Turn to present the Writ of *Quare Impedit* is general 559
11. In a *Quare Impedit* Nonsuit after Appearance is peremptory ibid.
12. 'Tis sufficient to lay a Seisin *Tempore pacis tempore Domini Regis* 561
13. In a *Quare Impedit*, Plaintiff declared upon an Agreement by Indenture to present by Turns 43
14. Such Compositions or Agreements may be made by Record, by Deed, or by Parol, and how each may be ibid. 44

See also *Privies*, &c.

2

Principal, Interest, &c. Vide Money.

Principal and Accessary.

1. In the highest and lowest Offences there are no Accessaries, for all are Principals Page 418
2. *Ergo* in Treason, the Writer or Concealer is as guilty as the Contriver or Actor ibid.
3. So in Battery, If *A.* only holds the Door while *B.* beats *C.* *A.* is as guilty as *B.* (*vide, &c.*) ibid.
4. If several make a Riot, and a Man is killed, they are all Principals in the Murder 334
5. Where a Stat. makes an Offence Felony, Accessaries (properly) tho' not named, are within it 542
6. *Aliter* where it makes a particular Fact more penal ibid.

See also *Felony* and *Libels*.

Prisage, vide *Subsidies*.

Privilege of Persons.

1. Privilege pleaded in the Negative is well, and *venit & dicit*, or *dicit* only, a good Defence 543, 544
2. A Philizer of *B. R.* arrested *per breve*, was discharged on common Bail, for he ought to be sued by Bill 544
3. But an Attorney of *C. B.* sued by Bill in *B. R.* must plead his Privilege, and can't be discharged on Motion ibid.
4. Where Privilege of Attorney is pleaded with a Writ, his being an Attorney can't be denied 545
5. *Aliter* if he pleads his Privilege without Writ ibid.
6. *A*

The TABLE.

6. A Plea of Privilege as Attorney of C. B. need not shew the Writ under Seal, not a *Venue*, nor where C. B. sits Page 545

7. For a joint Cause of Action against an Attorney and another Man, both must be arrested 544

8. A Bill can't be filed against a privileged Person in the Vacation, which begins as soon as the Court rises ibid.

9. On a voluntary Coming in to confess an Indictment, &c. no Privilege *eundo & redeundo*, allowed ibid.

10. For Pleas of Privilege in Abatement, *vide* Abatement, &c.

Privilege of Place.

1. There are four Causes of Privilege of the *Exchequer*, viz. 1. Informer for the King. 2. Accountant to the King. 3. Debtor to the King. 4. Officer or Attendant on the Court 546

2. Where Plaintiff is privileged the Suit is by *Quo minus*, where the Defendant, 'tis by Bill ibid.

3. *Supersedeas* to a Suit in the *Exchequer*, *dummodo non tangit nos vel* &c. disallowed, because the Matter was pleadable ibid.

4. See the Difference of allowing Privilege of the *Exchequer* in C. B. and in B. R. ibid.

5. Motion and Argument in B. R. for an Attachment 551

Privies and Privities.

1. If Lessee for Years assign, &c. there is no Privy of Estate between him and the Assignee, but only of Contract 317

Note; A Composition (or Contract) to present by Turns may be three Ways, viz.

First, *By Record*, either between Privies in Blood or Strangers, and there the Patron is not put to a *Quare Impedit*, but may sue a *Scire Facias* Page 43

Secondly, *By Deed*, either between Privies in Blood or Strangers, which if executed, the Plaintiff in a *Quare Impedit* need nor mention the Composition 44

Thirdly, *By Parol*, between Privies in Blood only; For between Strangers Composition can't be *sans Deed* 44

Prohibition and Consultation.

1. Prohibition to a Suit for a Legacy for refusing Proof of Payment by one Witness; *aliter* in Probate of Wills 547

2. Prohibition to a Probate of a Will of Lands and Goods upon Suggestion of *Non Compos* denied 552

3. Where Matter of the Suggestion does not appear on the Libel, Affidavit is necessary 549

4. And the Suggestion in the Case of Tithes, must be proved within six Kalendar Months from the *Teste* of the Prohibition 554

5. Prohibition shall not go for a *Modus* or other Foreign Matter unless pleaded below 551

6. A. substracts Tithes in one Diocese and removes into another, and being afterward found in the first, is there cited, &c. and Consultation awarded; for Substraction of Tithes is Local 549

7. A Prohibition may be granted after Sentence, where the Cause is not of Spiritual Conuzance; *aliter* of citing one out of the Diocese 548

The TABLE.

8. One having a prescriptive Right to a Seat in a Church, may, if disturbed, sue in the Spiritual Court to have his Possession quieted *Page* 551

9. And on Suit there against the Vicar of S. for not performing Divine Service in the Chapel of C. as bound by Custom, a Prohibition denied 550

10. Prohibition to a Suit there, for Solicitation of Chastity, he having been convicted on Indictment of an Assault with Intent to ravish, &c. 552

11. Prohibition lies to the Spiritual Court in any Suit, for denying a Copy of the Libel; but not to the Admiralty 553

12. And see a Prohibition to the Admiralty denied, unless the Defendant would appear and give Bail 548

13. Several Prohibitions to the Spiritual Court, for taking Bells, for calling Knave, against annulling Marriage, and Bastardizing 547, 548

14. So to the Court of Honour, on Suit there for Words 553

15. See a Prohibition granted to a Suit in Equity for Discovery of Matters to make the Defendant forfeit his Freehold 550

16. And see a Motion and Argument for a Prohibition to the Court of *Exchequer* on an Attachment issued thence for proceeding in *B. R.* 551

See also *Admiralty* and *Tithes*.

Proof, vide *Evidence* and *Witnesses*.

Property.

1. A Man has the Property of Things *feræ Naturæ*, that are kill'd in his own Ground 559

2. So one that has *Libera Piscaria*, has Property in the Fish (*& Co. Lit.* 122 denied) *Page* 637. Q. 357

3. What Property a Man has in Villeins and Negroes 666, 667

4. A Difference in Property of Things having a Natural Existence, and a Civil Existence only 667

5. Plea of taking by Distress for Rent, does not confess Property, &c. vide 640

Q

Quantum Meruit.

1. *A Quantum Meruit* for Meat, Drink, &c. laid uncertain as to Time, yet well 557

2. So the Word *Quantum* omitted in the Count, yet well, for *Tantum* supplies it *ibid.*

3. A *Quantum Meruit* is to be taken according to the Intent of the Parties 558

4. In *Quantum Meruit* Motion for bringing Money into Court, sometimes granted and sometimes denied 597

5. *Quantum Meruit* lies for serving as a Commissioner on a Commission to examine Witnesses 330

See also *Assumpsits* in *Actions* on the Case.

Quare Impedit.

1. In *Quare Impedit* the Plaintiff declares on Agreement by Indenture between Jointenants to present by Turns 43

2. And see how a Composition or Agreement to present by Turns may be made *ibid.* 44

3. In Case of a Prerogative Turn the Writ is general, *Quæ ad nostram spectat Donationem* 556

4. 'Tis

The T A B L E.

4. 'Tis sufficient to lay a Seisin
Tempore pacis tempore Domini Regis
Page 561
5. In a *Quare Impedit* Nonsuit after Appearance, is peremptory 559
See also *Presentation*, &c.

Que Estate.

1. A Termor for Years cannot declare on a *Que Estate* 363
2. In making Title, the Commencement of particular Estates must be shewn 562
3. A Diversity therein between Counts and Avowries *ibid.*

Quod Permittat, vide *Nusance*.

Quod cum and *Quare*, vide 636.

R

Recitals, vide *Evidence* 12, 13.

See also *Pleas*, &c.

Recognizances, *Statutes*, *Elegits*, &c.

1. **R**ecognizances in *B. R.* tho' taken at a Judge's Chamber, must be declared on as if taken in Court 564, 659
2. But *aliter* in *C. B.* for there it is to be declared on as taken at his Chamber *ibid.* vide 600, 659
3. Recognizance of Bail in *C. B.* binds from the Caption, but in *B. R.* from the Entry only 600, 659
4. No *Superfedeas* to a *Certiorari* for removing an Indictment, unless Recognizance entred into of 201. *ibid.*
5. The Conuzee of a Statute can't assign his Interest after Extent and

Liberate, if the Conuzor continues in Possession Page 563

6. On *Elegits*, if the Sheriff deliver more than a Moiety, the Execution is void *ibid.*

See also *Judgments*, &c.

Records.

1. In Escape the Plaintiff did not alledge the Commitment, *prout patet per Recordum*, but well on a general Demurrer 565
2. On a *Certiorari* the very Record is return'd (*vide Certiorari*) *ibid.*
3. On *Nul tiel Record* pleaded of a Record of the same Court, Day may be given for the Party to bring it in, or for the Justices to inspect it, but the Defendant cannot demur 566
4. A printed Statute not Evidence upon *Nul tiel Record* pleaded *ibid.*
5. Act of the Court upon Record may be altered the same Term, but of the Party not 566, 567
6. Roll of a precedent Term, ought to be filed, before Motion to make it a *Consilium* 565
- See also *Failer of Record*, *Plea* and *Restitution*.

Recoveries Common.

1. See several Precedents of Recoveries suffered by Infants, but that disallowed 567
2. To *A.* and *Ux.* for Life, Remainder to the Heirs Males of *A.* on the Wife begotten, *A.* can't dock this Remainder during his Wife's Life 568
3. In a Recovery the Tenant to the *Præcipe* was made by a Fine, which was after revers'd, yet good *ibid.*
4. And if the Tenant gains the Freehold at any Time before Judgment, 'tis good *ibid.*
5. Also

The TABLE.

5. Also Non-Tenure is cured by a subsequent Purchase *Page 569*

6. To A. and the Heirs of her Body, by one of the Name of *Searle*, is an Estate-Tail *570*

7. A Condition that runs with the Land can't be barr'd by Recovery; *aliter* of a Condition collateral *ibid.*

8. Tenant in Tail and he in Remainder may be vouched jointly *571*

9. If the Tenant vouches a Stranger, who Vouches Tenant in Tail, and he enters into Warranty, 'tis good *571*

10. And Tenant in Tail coming in as Vouchée, comes in in Privy of all Estates he ever had *ibid.*

See also *Fines, Uses and Trusts.*

Recusants, vide Church of England.

Refusal, vide Tender, &c.

Release and Defeazance.

1. A Defeazance must contain proper Words of Defeazance, &c. *575*

2. Covenant not to sue for a certain Time, is not a Release or Defeazance *573*

3. Bond from A. and B. to C. joint and several, a Covenant from C. not to sue A. is not a Defeazance. *575*

4. One Deed not to be construed as a Defeazance of another, without Necessity *ibid.*

5. A Release of all Demands to the Personal Estate of the Intestate, Releases not a Bond before Judgment and Execution *575*

6. Where one releases his Right he can't pursue his Action or Remedy *422*

7. But if he has a Right and several Remedies, the Discharge of one Remedy discharges not the other *ibid.*

8. Where a *Proviso* goes by Way of Defeazance of a Covenant, it must be pleaded on the other Side *Page 574*

9. But otherwise, where it is by Way of Explanation, or Restriction of the Covenant *ibid.*

10. A growing Rent is not released by a Release of all Demands *578*

11. One bound to release on Payment of Money, is bound to release on Tender and Refusal *75*

Remainder, vide Page 591.

1. Every Remainder is to vest during the particular Estate, or *eo instanti* it determines *228*

2. And a Right of Entry must be presently upon the happening of a contingent Remainder *577*

3. A Right of Entry will support a contingent Remainder, but Right of Action not *576*

4. Surrender of Tenant for Life, being *Non Compos*, to a Remainder-Man, is void, and can't bar a contingent Remainder *ibid.*

5. A Tenant for Life, Remainder to his Wife for Life, Remainder to his 1st, 2d, Sons in Tail, Remainder to A's right Heirs; A. commits Treason, and then has a Son, and is then attainted, the contingent Remainder to him not discharged by vesting in the Crown during his Life, because the Wife's Estate is sufficient to support it *ibid.*

6. A Remainder may be of a Rent *de novo* *577*

See also *Devises, Grants and Reversions.*

Remedies, vide Actions in General, Release, Rights, &c.

Reader

The TABLE.

Render, vide Bail.

Rents, vide Day, &c. Release
10. and Page 466, 577, 578.

Repleader.

1. Repleader not allowed before Trial, not after a Default Page 579
2. When awarded, the Parties are to begin *de novo* at the first Fault *ibid.*
3. If denied where grantable, or granted where it should be denied, tis Error *ibid.*
4. Where a Defendant makes Default at *Nisi prius*, no Judgment can be for him, nor Repleader awarded 216
5. Repleader can't be where a Trespass is confess'd 173

Replevins, Avowries, and Homine Replegiando.

1. A Replevin may be by Plaint in the Country, as well as by Original here 701
2. Bailiff of a Hundred can't grant Replevins out of Court 580
3. Clerk of County-Court granted a Replevin without Bond or Surety to prosecute 467
4. The Sheriff in Replevin can't return that the Cattle, &c. were not taken 581
5. But after *Elongata* return'd and *Withernam* awarded, the Defendant may plead *Non Cepit* *ibid.*
6. Upon pleading *Non Cepit* or claiming Property, the Defendant shall have his Goods again *ibid.*
7. So in a *Homine Replegiando* he shall be bail'd on a *Non Cepit* *ibid.*
8. But on *Elongata* return'd therein, if he pleads *Non Cepit*, no *Withernam* shall issue 582

9. And in *Homine Replegiando*, the Defendant can't be bail'd before Return of the *Withernam* Page 582

10. Also the Plaintiff is demandable on Return of the *Withernam*, and may be Nonsuit for not appearing *ibid.*

11. And there may be a new *Capias* in *Withernam*, after the Defendant had been bail'd on the first 582

12. For a *Withernam* is only mesne Process, and not an Execution *ibid.*

13. Want of Addition not pleadable to a *Homine Replegiando* or Replevin 5

14. In Replevin Property in a Stranger is pleadable in Bar or Abatement, (vide *Abatement*) 3, 5

15. How *Prisel in auter Lieu* must conclude, and must make Suggestion for a Return 3, 94

16. And all Pleas in Abatement in Replevin (except Property) must suggest Matter for a Return 93, 94

17. Second Deliverance is a *Superfedeas* to the *Retorno Habendo*, but not to the Writ of Inquiry 95

18. In a Plea in Bar of Tender of Rent in Replevin, Q. If the Money is to be brought into Court, vide 583, 597

19. But see the Reason why it shall 58

20. And therein *De injuria sua absque hoc quod fuit in aretro*, amounts to the General Issue 583

21. Note; The Command or Authority in Replevin is not traversable 409

22. Avowry for Rent where Part is not yet due is Error, but may be cured before Judgment by abating the Avowry as to that 580

Request.

1. If A. requests B. to take Goods, and B. does it, &c. A. is a Trespasser 409
2. Con-

The TABLE.

2. Condition to do an Act at the End of seven Years on Request, Request must be made on the last Day
Page 585

3. Where a Request of Departure, &c. is necessary to make one a Trespasser 641

See also *Notice*.

Rescue.

1. Attachment for a Rescue is never granted upon Affidavits 586

2. But a Rescuer may be discharged on Affidavits *ibid.*

3. The Fine for a Rescue is four Nobles on each Offender *ibid.*

4. A Return, That the Bailiffs had him in Custody of the Sheriff, and that *A.* rescued him out of the Custody of the Bailiffs is ill, for Repugnancy *ibid.*

See also *Arrest of Body*.

Restitution.

1. Writ of Restitution lies not against any that are not Parties to the Record 589

2. Where Money recovered in a Judgment appears by Record to be paid, Restitution shall be *Sans Scire Facias* 588

3. But otherwise where it appears to be only levied *ibid.*

4. So where Judgment is set aside after Execution for Irregularity, there needs no *Scire Facias* for Restitution *ibid.*

5. Restitution denied upon quashing an Inquisition of Forcible Entry, a Lease for Years standing out *ibid.*

6. Traverse to an Inquisition of Forcible Entry is a *Supersedeas* to the Restitution 588

Return of Writs.

1. *Attach. feci* is good in a Return, and Surplusage in a Return rejected
Page 589

2. Process whereon to ground a *Testatum* is return'd by the Attorney of Course *ibid.*

3. A Return of a *Certiorari* by Clerk of the Peace is ill 479

4. Eight Days to be between the *Teste* and Return of a *Ca. Sa.* against the Principal, in order to charge the Bail 599, 602

See also *Certiorari*, *Mandamus*, *Scire Facias*, and *Writs*.

Reversion.

1. *A.* seised of Lands *a parte Materna* limits several Estates with Remainder to the Use of his right Heirs, the Heir *a parte Materna* shall have it 590

2. For it is the antient Use, and therein no Difference between an express and implied Use *ibid.*

3. *Note*; There may be a Possibility of *Reverter* where no Remainder can be limited 231

4. Of Grants of Offices in Reversion, *vide* Offices, &c.

Rights and Remedies, *vide* *Actions in general*, 2, 13, 19, 22, 27, 29, *Release* and Page 415, 444, 460, 576, 577, 686.

Revocation, *vide* *Wills*.

Riots,

The TABLE.

Riots, Routs and unlawful Assemblies.

1. Both an unlawful Assembly, and an unlawful Act done, are necessary to make a Riot, *vide bis* Page 594
2. *Ergo*, If three or more assemble lawfully, tho' they quarrel and fall upon one of their Company, 'tis no Riot 595
3. Yet in that Case, if they fall upon a Stranger, 'tis a Riot; but in those only who concur *ibid.*
4. Indictment for a Riot and Assault, Acquittal of the Riot, is also of the Assault 593
5. To an Inquisition of a Riot upon View, the Sheriff must be Party *ibid.*
6. But if the Rioters disperse before the View, the Justices may make the Inquisition without him *ibid.*
7. And such Inquisition by two Justices *Capt. pro Domino Rege* is well, and need not be *pro Domino Rege & Corpore Com.* *ibid.*
8. Yet all Inquisitions by Grand Jury are to be *pro Corpore Com'* as well as *pro Domino Rege* *ibid.*
9. Justices not inquiring within the Month, are punishable; yet they may inquire after *ibid.*
10. If several make a Riot and a Man is kill'd, they are all Principals in the Murder, *vide* 334, 335.

Rivers, vide Highways.

Rules of Court.

1. Defeating a Rule of Court, tho' by a Stranger, is a Contempt, *vide* 176, 177, 596
2. A Rule of Court is to be construed largely for his Benefit for whom made 596

3. Yet see the Exposition of a Rule to put off a Trial *super Solutione Curstag.* Page 83

4. See Proceedings against the Defendant on Breach of the Rule for confessing Lease, Entry, &c. 259

5. And see Breach, &c. of Rules of Reference to three Foremen, *bis* 73 and 84

6. Also the Practice of striking Juries on Rules of Court 405

7. And in what Cases Rules shall be to bring Money into Court 583, 597

8. Where Executor or Administrator sues, Money is not to be brought into Court, because they are not liable to Costs 596

9. Tho' the Plaintiff (in other Cases) is Nonsuit, yet he shall have Money brought in, on striking it out of the Declaration 597

See also *Trial, View and Visne.*

Rules of Law, vide Maxims.

S

Scire Facias.

1. **I**N the Case of the King, there needs not any *Scire Facias* after the Year 602
2. See the Rule for Suing out and Returning *Scire Facias* in *B. R.* and how it differs from *C. B.* 599
3. Fifteen Days inclusive to be between the *Teste* of the first, and Return of the last *ibid.*
4. And eight Days between the *Teste* and Return, when against the Principal, in order to charge the Bail 602
5. If

The T A B L E.

5. If against the Principal, the Writ is *in hac parte*, if against the Bail, *in ea parte* Page 599

6. A *Scire Facias* against Bail in *B. R.* must be brought in *Middlesex* only; *aliter* in *C. B.* 564, 600

7. A *Scire Facias* against Bail must lie in the Sheriff's Hands a convenient Time 599

8. *Scire Facias* on Recognizance of Bail assigning Breach that the Defendant did not pay nor render *Prisonæ Mar. Maresch. nostræ* 602

9. Whether a *Scire Facias* lay in Personal Actions before *West. 2.* and Lord *Coke's* Opinion doubted 600

10. In Error to reverse a Fine, why 'tis needful to have a *Scire Facias* against the Tertenants, as well as the Conuzces 598

11. A Return of *Scire Feci* against Tertenants ought to be of all the Tertenants *in Balliva sua* *ibid.*

12. A *Scire Facias* lies on a Judgment in Ejectment, and may be general against all the Tertenants, or particular, and name 'em 600

13. Tertenants return'd for several Parts, can't join in a Plea, which goes to one Part only 601

14. Where Non-tenure may be pleaded generally, and where specially *ibid.*

15. Judgment on a *Scire Facias* against Bail reversed for Want of Warrant of Attorney 603

16. See the Case of a *Scire Facias* upon a Recognizance of Bail in Error 520

See also *Judgments* and *Restitution*, 2, 3, 4.

Seizin, vide *Disseizin*.

Servants, vide *Masters*, &c.

Service and Suit.

1. Service by doing Suit to the Court of the Manor, twice a Year, held well Page 604

2. A Manor-Court to inquire into Rents and Services arrear, may be *vis in anno* *ibid.*

3. And the Suit to such Court shall be intended by Reservation, before the Statute *Quia emptores*, &c. *ibid.*

4. Also one that is resiant may be bound to do Suit real *ibid.*

5. For it shall be intended a Suit-Service reserv'd on creating the Tenure. *ibid.*

Sessions General and Quarter.

1. An Appeal may be adjourn'd from one Quarter-Sessions to another *Q.* 447, 605

2. Sessions can't be entred as sitting three Days together, but must be an Adjournment 494, 605

3. An Order of Sessions quash'd, because it concern'd one of the Justices nam'd in the Style of the Court 607

4. They can't make an Order to prosecute an Offender out of the County-Stock *ibid.*

5. They may alter and set aside their own Orders the same Sessions 494, 606

6. So their Order for one to relieve his Father till Sessions order the contrary, is good 534

7. A Special Order of Sessions ought not to conclude to the Opinion of *B. R.* 486

8. They may affirm or quash, but not supersede an Original Order 472

9. They can't suppress an Alehouse licensed, unless for Disorder 470

10. They may make an original Order to discharge Apprentices 491

11. Their

The TABLE.

11. Their Power extends only to such Trades as are named in the Statute (*vide* Apprentices) Page 471

12. They are proper Judges whether fit to oblige one to take an Apprentice or not 491

13. Orders on 43 *Eliz. c. 2.* must be said *ad quarterialem Sessionem, &c.* 474, 476

14. Orders on two different Statutes must be distinct 487

15. Sessions on Appeal can't send to a third Place nor Party 475

16. And one Sessions on Appeal can't refer a Matter to be determined by another Sessions, *bis* 477

17. If the first Order be naught, no subsequent Order on Appeal can make it good 482

18. And where they quash an Order, it must appear to be on Appeal 479

19. Appeal from an Order of Bastardy must be to the General Sessions 482

20. And to the first Sessions after Notice to the Father, of the first Order 480

21. Appeal from an Order of Corporation-Justices, must be to the Sessions of the County, not the Corporation 490

22. Sessions can't annex Parishes, but may order one Parish to contribute to the Poor of another 480, 481

23. On Appeal from Poors Rate, the Sessions may quash the whole Rate 483

24. And they may make, or order the Church-wardens, &c. to make a new Rate *ibid.*

25. Sessions may appoint and remove High and Petty Constables, and are the best Judges of the Matter 150, 502

Vide Constables.

26. Upon Appeal from Allowance of Overseers Accounts, the Sessions must execute their Judgment in the

same Manner as two Justices ought to do Page 533

37. Sessions being but one Day in Law, may alter their Judgment and make a new Order, but must certify only the latter 494

28. And they need not set forth the Reasons of their Judgment, and how the Court shall judge thereon 607, 608

See also *Alehouses, Bastardy, Justices, Poor and Statutes* 5

Sheriffs.

1. A Sheriff may take Bail-Bond on Attachment of Contempt, but the Prosecutor may refuse to accept it 608

2. A Sheriff fined and committed for delivering to an Infant a Writ of Appeal brought by his *Prochein Amy* 177

3. What Fees are due to the Sheriff on Execution of Writs, and his Duty therein, *vide Fees and Execution*, and for his Duty in taking Bail, see *Bail* 17, 18, 19, &c.

4. A Sheriff is the Officer of B. R. in the same Manner as Constables to Justices of the Peace, *Q.* 175
See also *Church of England.*

Solicitor, vide Attorney.

Statutes in General, and their Exposition.

1. Where a Statute gives or creates a *Right*, the Party of Consequence shall have an Action at Law to recover it 415

2. Where a Statute creates an Offence, no Remedy can be pursued, but what the Statute gives 460

3. Where a Statute introduces a new Law, by giving an Action where none was before, &c. the Plaintiff need not conclude *contra formam Stat.* 505

Z

4. Ali-

The TABLE.

4. *Aliter* where it gives the same Action with a Difference of Circumstances, as double Damages, &c.

Page 565

5. Where a Statute gives a Penalty to be recovered before Justices, and prescribes no Method, it ought to be by Bill

606

6. And Orders of Sessions on two different Statutes must be distinct

487

7. Where a Statute gives a Penalty to a Stranger, and he sues, he is a *Common Informer*; *aliter* if to the Party grieved

30

8. Where a Statute directs things of a publick Nature, *may* is to be taken as *shall*

609

9. Where it makes an Offence Felony, Accessories (*properly*) are within it, tho' not nam'd

542, 543

10. *Aliter* where an Offence at Common Law is thereby only made more penal

ibid.

11. Tho' the Title is no Part of the Statute, yet if set out wrong 'tis fatal

609

12. That the Statute 5 *Eliz.* is a hard Law

613

13. *Ergo*, the Exercising a Trade by others is within that Statute

610

14. Yet following a Trade 7 Years is sufficient, *sans* binding, &c. (*vide* Apprentices)

613

15. Where a Trade is averr'd to be so at the Time of making the Act, the Court will intend it within the Act

bis 611

16. And that many Trades are within the Act, not mentioned therein

ibid.

17. One may lett Coach-Horses and Coach-Man without Licence, on 5, 6 *W. & M. c. 22.*

612

18. Debt on the Stat. 10 *W. 3. c. 2.* for making Buttons of Wood

612

19. See the Construction of the Stamp-Act, where a Bond and Warrant of Attorney were on the same Paper

ibid.

See also *Actions Popular*, *Orders*, *Poor*, &c.

Statutes of Hue and Cry.

1. Where the Servant is robb'd of his Master's Goods, the Master may sue the Hundred

Page 613

2. So where robb'd of his Master's Money, the Master may sue the Hundred

ibid. 614

3. But one robb'd and refusing to take the Oath, cannot sue

613

4. The Declaration need not set forth the Oath to be taken before a Justice of the same Hundred

614

Statutes Particular, Q.

Subsidies, Taxes and Customs.

1. By *Taxes*, is meant in general, *Parliamentary*

615

2. See the different Manner of Taxing, and when introduc'd

ibid. 616

3. And of the Clause in Conveyances, to have no Deduction for Taxes

ib.

4. Where Deduction for Taxes shall be out of Annuities, and where not

ib.

5. One may be assess'd by the Land-Tax, either where he dwells, or carries on his Employment

ibid.

6. *Prisage*, an ancient Duty in Specie on Goods imported, may be granted away by the Crown

617

7. But are chargeable with Duties charged on the said Goods, while in the Grantees Hands

ibid.

Suit, vide Service.

Sunday, vide Term-Time.

Supersedeas, vide pag. 472, 587. & *Certiorari*, &c.

Surrender.

1. A Surrender, where to be construed as a Conveyance at Common Law

621

2. Sur-

The TABLE.

2. Surrender vests the Estate in the Surrendree *sans* Notice or his express Acceptance Page 618

3. A Surrender vests a Fee in *A.* & *Ux.*, tho' an Estate for their Lives express'd, &c. *vide* Tail 620

4. A Surrender is to be construed as a Conveyance at Common Law 621

5. Surrender of a Patent void for want of Inrolment. 191

Lives, and their Heirs and Assigns, and for Default of such Issue to *A.* and his Heirs, is a Fee in *A.* and his Wife Page 920

See also *Devises, Fines, Recoveries, Uses, &c.*

Tenants in Common, vide Jointenants.

Tender and Refusal, Amends, &c.

T

Tail.

1. BY what Words an Estate-Tail may be created 621

2. The Word *of* in *English*, equal to *de* or *ex* in *Latin* 622

3. In a Gift in Tail it must appear of what Body the Issue are to come 621

4. To *B.* and the Heirs Males of the said *B.* lawfully begotten, and for Default, &c. over, is a Tail *ibid.*

5. Fees are *Absolute, Base, Restrained, Conditional* *ibid.*

6. Bargainee of Tenant in Tail has a descendible Estate 619

7. What Conveyances by Tenant in Tail are defeasible by the Issue *ibid.*

8. Covenant by Tenant in Tail to stand seised to the Use of himself for Life, Remainder to *A.* in Tail, is void *ibid.*

9. Because the Remainder is to take Effect after his Death (*Q.*) *ibid.*

10. Tenant in Tail covenants to stand seised to the Use of *A.* and his Heirs, or of *A.* for Life, with Remainders; it divests the Estate-Tail 620

11. *Aliter* if the new Use be to take Effect after his Death *ibid.*

12. Surrender to *A.* for Life, Remainder to *A.* and his Wife for their

1. If one is oblig'd to release on Payment of Money, he is bound to release on Tender and Refusal, as if actually paid 75

2. When both Parties meet at the Time and Place, he that pleads Tender must also plead Refusal 623

3. And if the Defendant be absent, the Plaintiff must shew *That*, and that he was there at the Time, and Tendered *ibid.*

4. And the Pleader must shew when he came, and how long he staid, &c. 624

5. He must stay till Sun-set, unless special Circumstances shewn shall vary it *ibid.*

6. To a general *Assumpsit*, Tender, &c. must be pleaded with a *Tout temps prist*, which can't be after Imparance 622

7. How *Tout temps prist* is pleadable in *Indebitatus Assumpsit*, &c. 623

8. In pleading Tender in Debt, the Defendant prays Judgment *de Dampnis*; but in Case *de ulterioribus Dampnis* *ibid.*

9. Owner of a Stray may seise it, tendring Satisfaction, and in pleading it, need not shew the Sum tendred 686

10. That the Defendant does not aver the Amends tendred was refused 687

11. *Assumpsit*,

The TABLE.

11. *Assumpsit*, Satisfaction pleaded, and Issue upon the Acceptance, held good Page 627

See also *Payment*, &c.

Term-Time, and Computation.

1. A Bill can't be filed against a privileg'd Person in the Vacation 544

2. And the Vacation begins the last Day of the Term, as soon as the Court rises *ibid.*

3. No Matters of Law to be heard the last Day of a Term 624

4. But a Trial at Bar may be the last Paper-Day, where the King is Party 625

5. *Sundays* and Holidays are computed for Acts done out of Court 624

6. But *Sundays* are not included in the four Days to move in Arrest of Judgment 625

7. *Ergo* one may be taken on an Escape-Warrant on a *Sunday* 626

8. And a Citation may be serv'd by fixing it on the Church-Door on a *Sunday* 625

9. *Tres Trin.* on *Sunday*, Writ of Inquiry then returnable, if executed *Monday*, 'tis Error 626

10. The Court takes judicial Notice of the Computation of Time, the *Kalendar*, &c. 626, 627

11. An Insurance of *A.*'s Life for a Year, *A.* died on the last Day, the Insurer is liable 625

12. A Condition to an Act at the End of 7 Years on Request; Request is to be made the last Day 585, *vide* 624

See also *Age*, and *Day*, and *Departure*.

Town, *vide* *Parish*.

Toll, *vide* *Fairs*, &c.

4

Traverse.

1. A Traverse that puts Matter of Record in Issue to the Country is ill Page 521

2. Where a Traverse ought to conclude to the Country, and where with an Averment 4

3. A Consideration Executory is traversable, *Ergo* a *Venue* must be laid 22

4. In *Replevin* Matter suggested for a Return in a Plea in Abatement, is not traversable 93

5. Where Traverse of the Command is sufficient in *Trespass* or *Replevin*, but not in *Clausum fregit* 107

6. And see a Difference in Traverses on *Avowries*, and *Declarations* in Debt, &c. 562

7. That which is immaterial is not admitted by not being travers'd 561

8. Where a Traverse goes to the Matter, all before is waved; *aliter* where to Time only 642

9. Traverse of an Inquisition of Forcible Entry is a *Superfedeas* to the Restitution 587

10. In *Assumpsit* Satisfaction pleaded, Issue on the Acceptance is good 627

11. *Non antea* is no Traverse, where further Matter must be disclos'd before he can conclude to the Country 628

12. *De injuria sua propria* is a Replication to a Justification by the Common Law or general Statute *ibid.*

13. *Absque hoc*; that he ousted him *de premisis*, goes to every Part 639

14. On pleading a Seisin generally, Traverse may be taken that he is Sole seised *ibid.*

15. But

The TABLE.

15. But *Quere* the Difference of traversing a Sole Seisin, as to Tenants in Common and Parceners Page 630

See also *Pleadings* and *Trespases*.

Treason.

1. Attainder of Treason revers'd, for Want of *Allocutus* before Judgment 630

2. And Judgment therein revers'd, for want of *contra Ligeantia sue debitum*, in the Indictment *ibid*

3. And another, for want of *ipso vivente*, or *in Conspectu suo*, as to burning the Bowels 632

4. Record of Judgment therein refused to be amended by the Minutes of the Court of *Old Baily* *ibid.*

5. Indictments of Treason, &c. can't be supplied by Intendment 631. *vide* 375

6. Copy of Indictment therein not granted, after pleading 634, *vide* 153

7. Indictment of a Subject *contra Ligeantia sue debitum* is well, without *naturalis*, &c. 633

8. *Aliter*, where an Alien is indicted, if *naturalis*, &c. be therein *ibid.*

9. Indictment for compassing the King's Death, the Treason being first laid, the Overt-Act need not be laid *proditorie* 633

10. *Aliter* where the Treason consists in such Act *ibid.*

11. Words of Perswasion or of Consultation only, an Overt-Act of Treason in compassing the King's Death 631

12. Indictment for levying War, or adhering to the King's Enemies in general, *sans* shewing particular Instances, not good 634

13. Joining with Rebel Subjects of the King's Ally, fighting under the

Command of an Enemy Prince, is Treason, &c. Page 635

14. Altho' such fighting be directly (and only) against such Ally, for 'tis adhering to the King's Enemies *ibid.*

15. Cruising is an Overt-Act of adhering, &c. and so is lifting and marching *ibid.*

16. And there may be a levying War, without actual fighting. *ibid.*

See also *Attainder*.

Trespas.

1. In a Declaration in Trespas, *contra pacem* is Substance 636

2. And Trespas laid in a former King's Time *contra pacem* only of the present, is ill on Demurrer, but cured by Verdict 640

3. Also Declaration in Trespas without *vi & armis*, held ill on general Demurrer 636

4. But *Quare vi & armis* is ill, for *quare* is not positive, but only interrogatory *ibid.*

5. Trespas, *Quare duos Equos apud D. &c. & Triticum de bonis propr. ipsius A. cepit* held ill, because the Property of the Horses not shewn, and the conditional Damages intire 640

6. And Plea of taking a Distress for Rent does not confess Property *ibid.*

7. Trespas for entring his House and taking *separat. Claves*, &c. good, *sans* shewing the Number 645

8. Trespas for entring the Plaintiff's House, and assaulting, &c. his Servants; the Assault, &c. may be by way of Aggravation of Damages 642

The TABLE.

9. Where Matter may be laid as Aggravation, for which alone Trespass lies not, *vide* Page 119

10. Disturbing one in the Use of his Franchise is a Trespass 594

11. Trespass lies for Fishing in *Libera Piscaria*, and taking his Fish 637

12. So one that has Free Warren, may have Trespass against any but the Owner of the Soil, for hunting there *ibid.*

13. See Trespass brought against the Sheriff's Officer, for hanging a Man in *privato suo solo* 648

14. *Son Assault demesne* a good Plea in *Mayhem* where the first Assault was violent 642

15. Where in entring *A's* Close, there is only Force in Law, *A.* can't lay Hands on the Trespasser before a Request to depart; *aliter* where actual Force 641

16. Taking Cattle from *H.* is a taking from his Person *ibid.*

17. Where the Trespass is transitory, the Plaintiff can't pretend a Right to the Place 643

18. *Ergo* in such Case, the Defendant may justify by Possession only *ibid.*

19. *Note*; A Justification must confess the Trespass (*vide Justification*) 637, 638

20. Trespass for entring his Close and hunting, laid with a *Continuando*, and held well 638, 639

21. Acts that being once done cannot be repeated, cannot be laid with a *Continuando* 639

22. As Trespass in cutting down such a Number of Trees cannot be continued *ibid.*

23. But a general *Continuando* shall be applied to what may be continued, after Verdict *ibid.*

24. In Trespass where a Traverse goes to the Matter, all before is In-

ducement, and waved; *aliter*, if to Time only Page 642

25. Trespass by Lessee of a Copyholder for Life for cutting down, &c. by the Lord, held maintainable in *B. R.* and affirmed in *Cam. Scacc.* but revers'd in the House of Lords 638

26. Trespass *quare captivum suum cepit*, for taking a Negro 666

See also *Justification*, and *Novel Assignment*.

Trial.

1. When a Trial at Bar is to be moved for 649

2. A Cause can't be tried at Bar where the Action is laid in *London*, by reason of their Charter 644

3. A Trial at Bar not denied to the Officers of the Court, or Barristers 651

4. And in any Cause of Value or Difficulty, a Trial at Bar may be had of Common Right 648

5. Also, where the King is Party, a Trial at Bar may be the last Paper-Day in Term 625

6. A new Trial after Trial at Bar refus'd in Ejectment, because not conclusive 648. *vide* 650

7. A new Trial is rarely granted in hard Actions 644, 648

8. As, in Case for negligent keeping Fire, Actions for Words, &c. 644, 648, 653

9. No new Trial against the Equity of the Cause 644, 646. Nor for Absence of Counsel 645

10. Nor for Defect of Preparation 653. Or any Omission of the Party 273, 647

11. Nor for a Mistake in Point of Law; or want of Notice after Defence made 646

12. In-

The TABLE.

12. Indictment for a Libel, Defendant acquitted, no new Trial Page 646

13. Yet a new Trial may be where the Judge of *Nisi prius* misdirects the Jury 649

14. No new Trial or Writ of Inquiry granted for too small Damages, unless there is some Trick, &c. 647

15. A new Trial for excessive Damages, and the same Damages being given, a third Trial denied 649

16. A new Trial, because the Foreman had declared the Plaintiff should never have a Verdict 645

17. Jury after gone from the Bar sent for an Act of Common Council given in Evidence, yet new Trial denied *ibid.*

18. In Trespas for Cutting Trees, Verdict for Defendant against Evidence, yet because the Plaintiff had Benefit by the Cutting, new Trial denied 647

19. And Note; No new Trial can be in an inferior Court 201, 650

20. Nor any Motion for a new Trial, after Motion in Arrest of Judgment 647

21. If a Cause has lain at Issue four Terms, there must be a full Term's Notice of Trial 650

22. And see a Verdict set aside for want of such Notice, and that Rule explain'd 645, 650

23. Suing out a *Venire Facias* tested the last Day of the Term, not a Proceeding within Term as to Notice of Trial 650

24. Two Days Notice is to be given after *Ne recipiatur* at Sittings, &c. 653

25. A Trial is not to be put off, for that a Suit is pending in the Spiritual Court for the same Matter 646, 649

26. If the Principal Cause be within the Jurisdiction, and an Issue arises which depends on Foreign Laws, it

may be tried in the next County, and the Foreign Laws given in Evidence Page 651

27. And how a Foreign Matter is to be laid in the next adjacent County in *B. R.* *ibid.*

28. In what Cases the Defendant may carry down a Cause to be tried by Proviso 652

29. Trial by Proviso can't be in the Case of the Crown, nor at *Nisi prius*, unless by Warrant from the Attorney General *ibid.*

30. When any *Indictment* is removed into *B. R.* the Defendant can't carry it down to Trial without Leave of the Court 653

31. And on such Removal by the Prosecutor, if the Defendant comes in by Process, he shall give Security to try it 652

32. A temporal Incident in a Cause in the Spiritual Court, must be tried by the Rule of the Common Law 547

33. A Judgment was set aside tho' strictly regular, in order to try the Merits of the Cause 518

34. *Bills of Exceptions* must be tendered at the Trial, and see the Nature thereof 288, 289

See also *Evidence* and *Verdict*.

Trovee and Conversion.

1. Trover lies against a Carrier for Negligence, as for losing a Box, &c. 655

2. But not for an actual Wrong, as if he break it to take out the Goods, or sell it *ibid.*

3. *Ergo* Denial is no Evidence of a Conversion, if the thing appears to be lost by Negligence *ibid.*

4. *Contra*, If that does not appear, or if he had it in his Custody when he denied to deliver it *ibid.*

5. Trover

The TABLE

5. *Trover* lies not for a Negro,
vide Villeins Page 666

6. *Trover de scripto suo obligatorio*,
good 654

7. *Trover* for 20 Ounces of Cloves
and Mace, held well, tho' not shewn
how much of each, or that they were
mixed *ibid.*

8. A Goldsmith has Lottery Tick-
ets of *A.* and *B.* and delivers *A.*'s
Tickets to *B.* as his own, *A.* may
have *Trover* against *B.* 283

9. In *Trover* for a Horse, Bridle
and Saddle, Motion to bring the Bri-
dle and Saddle into Court, denied
597

10. *Trover* lies for Plate generally,
so for 260 *pecuniis argenti* 219

11. Note; A special Plea in *Tro-*
ver ought to confess a Conversion
654

12. See a Demurrer to a Declara-
tion in *Trover*, *inter alia*, *De duobus*
Fulcris 218

13. One Jointenant or Tenant in
Common, or Coparcener, can't bring
Trover against his Companion, but
may against a Stranger 290

See also *Evidence* 16, 32.

Trusts, vide Uses.

Tythes.

1. Tithes of Agistment of barren
Cattle are due of Common Right 655

2. A County or Hundred can't pre-
scribe *in Non decimando*, for Things
tithable of Common Right *ibid.*

3. *Aliter* of Things not tithable of
Common Right *ibid.*

4. Payment of Tithes of one Spe-
cies; not a good *Modus* for all 657

5. *Modus* of 10 Fleeces of Wool,
and 2 Lambs for all Tithes, (*Court*
divided) if good or not 656

2

6. A *Modus* should be as certain as
the Duty destroyed by it Page 657

7. A *Modus* to pay 2s. in the
Pound of the improved Rent is ill
ibid.

8. A *Modus* to pay Part of the very
thing that is Tithes, is not good, un-
less payable in another Manner 656

9. *Ergo*, if to pay a whole Meal's
Milk such a Day, Night and Morning
till, &c. in Lieu of Tithe-Milk, is ill
ibid.

10. A Suggestion in the Case of
Tithes must be prov'd within six Ka-
lendar Months of the *Teste* of the
Prohibition 554

11. See the Case of a Composition
for Tithes *quamdiu ambabus partibus*
placuerit, &c. 144

See also *Prohibition*.

V

Vacation, vide *Term-Time*, &c.

Vagabonds and *Vagrants*, vide
Poor.

Variance.

1. **V**ariance between the Writ and
Count not pleadable *sans*
praying *Oyer* of the Writ 658

2. Variance between the *Scire Fa-*
cias and Judgment, not amendable,
tho' the Writ not faulty *in se* 52

3. Deed dated in the Year of our
Lord, set forth with the Year of the
King also; no Variance 658

4. So a Bond to *A.* in 40 l. *solvend.*
to his Attorney, declar'd on as pay-
able to *A.* no Variance 659

5. So in Debt on Bond to perform
Award, Omission in the Replication of
a void

The TABLE.

a void Part of the Award, is no Variance Page 72

6. *Aliter* if the Omission be of any Part not void *ibid.*

7. In Debt where the Quantity of the Duty depends on the Deed, Variance is fatal, and can't be help'd by *Remittitur* 658

8. *Aliter* where the Matter is extrinſick, and does not depend on the Deed *ibid.*

9. Recognizance in *C. B.* taken at a Judge's Chamber pleaded as taken in Court, is a Variance, (*vide Recognizance*) 659

10. If Error abates by Motion, the Court must be mov'd for Execution; *contra* if for Variance 264, 265

11. Writ of Error was of a Record *per Billam*, the Record return'd was *per breve de Privilegio*, and quash'd 660

12. Information for a Libel, Variance in the Word *Nor* for *Not*, held fatal upon Evidence *ibid.*

13. In declaring for Words spoken, Variance in Omission or Addition not material if the Words prov'd are actionable 661

14. But otherwise in a Tenor of Words written *ibid.*

15. And in pleading a Libel may be set forth (*in hac Anglicana verba*) in *English*, or the Sense and Substance of it, (*Q*) *ibid.*

16. See a Variance between a Writ of Error and a Record, and refus'd to be amended, tho' the Curſitor's Note was right 49

17. See also a Variance between the Writ and Return in the Name of a Corporation 434

18. And see a Variance in the Name of a Parish, *Waking* and *Woking* 472

See also *Abatement*, *Amendment*, *Error*, and *Misnomer*.

Venue, *vide Viſne*.

Verdicts.

1. Declaration, for keeping a Bull which used to run at Men, not saying *ſciens* or *ſcienter*, held naught after Verdict Page 662

2. For keeping a Boar *ad mordend' animalia conſuet' ſcienter*, &c. held well after Verdict *ibid.*

3. And Incertainty in the Count or Declaration, is cured by Verdict 663

4. Where a Verdict will aid a Title defectively set forth, but not a defective Title 364 and 664

5. In Debt on ſingle Bill, and *Nil Debet* pleaded, Jury find *Nil Debet* to Part, and *Debet* the Reſidue, held well after Verdict *ibid.*

6. A Verdict may be taken upon any Part of the Declaration to which the Evidence is applicable 133

7. Judgment arreſted, becauſe more Damages given than ought 663

8. Damages given in Treſpaſs laid at a Time not come, it ſhall be intended another Time was proved 662

9. No finding of a Jury can diſcharge a Man againſt a Confeſſion, by *Nient dedire* 23

10. See a ſpecial Verdict found on a ſingle Point 249

See alſo *Evidence*, *Furor*, *Trial*.

View.

1. A View is grantable, but that is only where the Title is in Queſtion 665

2. Before the View is granted the *Venire* muſt be return'd, and then the
B b Rule

The T A B L E.

Rule is, that so many of the Panel shall view it, &c. Page 665

3. See the Method of proceeding in Case of a View *ibid.*

Vill, vide Parish.

Villeins and Villenage.

1. *Indeb' Assump'* for a Negro sold. Q. whether Inheritance or not 666

2. Trover lies not for a Negro, for Men can't be the Subjects of Property 666, 667

3. But in Trespafs, *quare Captivum suum cepit*, the Plaintiff may give in Evidence that he was his Negro 667

4. And see there the Difference of Properties in Things of a natural and civil Existence *ibid.*

5. And how *Servus pradialis* differs from *Servus personalis* *ibid.*

Visne.

1. At Common Law all Actions were laid in the proper County, that the Jury might be *de vicineto* 668

2. And the Practice of changing *Venues* in transitory Actions began in King James the First's Time 670

3. The Clerk of Assize may lay his Action in *Middlesex*, and the *Venue* shall not be chang'd 670, 671

4. And if the Defendant be a Barrister, Attorney, &c. he may change the *Venue* to *Middlesex* 668

5. Motion to change it ought to be within eight Days after Delivery of the Declaration (Q) *ibid.*

6. And heretofore was never granted after Rules for Pleading were out *ibid.*

7. And on such Motion, Affidavit must be of the Time of the Delivery of the Declaration 667, 670

5

8. The *Venue* refus'd to be chang'd in an Action of *Scand. Mag.* Page 668

9. So in Case for False Return, it can't be chang'd without Consent of the Plaintiff 669

10. And where Evidence necessary to support the Action arises in two Counties, he may lay it in either *ibid.*

11. *Venue* not chang'd in Action against a Lighterman for Goods lost 670

12. Yet in False Imprisonment against the Sheriffs of *London*, first chang'd to *London*, and then back to *Middlesex* *ibid.*

13. And see the Rule, where after *Venue* chang'd, the Plaintiff would bring it back again 669

14. A Consideration Executory is traversable, *Ergo* a *Venue* must be laid 22

15. Plea of Privilege of C. B. need not be with a *Venue*, &c. 545

16. The *Venue* in Indictments of Conspiracy, &c. must be where the Conspiracy was, and not where the Result thereof was put in Execution 174

See also *Travers*, 3.

Universities and Schools.

1. Vice-Chancellor's Court can't hold Plea for the Penalty of a Statute 676

2. See the Case at large of teaching a School *sans* License, and a Construction of the Act of Toleration in that Particular 672, 673

3. See touching the Franchises of the University of *Oxford* 343

Void and Voidable.

1. Bond of an Infant or *Non Compos*, is void 427, 675
2. So

The TABLE.

2. So the Surrender of Tenant for Life (being *Non Compos*) to him in Remainder is void *Page 576*
3. Erroneous Judgment of Inferior Court is void, but of Superior Court only voidable *674*
4. Where Orders of Justices are void or only voidable *ibid.*

See also *Error, Judgments and Orders.*

Uses and Trusts.

1. Husband and Wife covenant to levy a Fine of the Wife's Land to the Use of the Heirs of the Body of the Husband on the Wife begotten, the Limitation is void *675*
2. Fine and Recovery wherein the Conusee was Tenant, and no Uses of the Fine declared, intended to the Use of the Conusee in order to make a Tenant of the Freehold *676*
3. Where Uses may be averr'd by Parol, and where not, *vide ibid.*
4. Where a Conveyance to Uses enures by way of Transmutation of Possession, the Uses may be either declared or revoked without Deed *677*
5. Where the Uses of a Recovery are declared by a Deed subsequent, the Pleading should be general, that the Recovery was to such Uses *676*
6. If a Lease and Release be pleaded to *A.* and his Heirs, and no Consideration appears, nor said to whose Use, it shall be intended to the Use of the Relessee and his Heirs *678*
7. *Quare*, Whether a resulting Use can be upon a Conveyance by Lease and Release *ibid.*
8. Lease and Release by *A.* to Trustees and their Heirs, to the Use of *A.* for 99 Years, Remainder to the Use of the Trustees for 25 Years,

Remainder to the Heirs Male of *A.*'s Body, this last Remainder is void *Page 679*

9. Devise to Trustees and their Heirs, on Trust to permit *A.* to take the Profits for his Life, and then to stand seised to the Use of the Heirs of *A.*'s Body, is a Use in *A.* and he has a Tail *ibid.*

10. Whatever was or would have been a Trust at Common Law, is since the Statute a Use executed *ibid.*

11. If Trustees join to bar contingent Remainders, 'tis a Breach of Trust *680*

12. *Cestuy que Use* may take Advantage of a Warranty, annex'd to the Estate *685*

13. No Difference between Express and Implied Uses *590*

See also *Devises, Recoveries, Reversions and Tail.*

Usury and Extortion.

1. Justices of Peace have no Jurisdiction upon the Statute of Usury *680*

2. Charge of Extortion ought to be particular, and that the Defendant took it *Extorsive ibid.*

3. And by Stat. 1 *W. & M. Sess. 1. c. 21.* 3, 4. the Justices have only a special Authority to remove the Clerk of the Peace for Extortion. *Ergo*, it must appear to be Extortion, in their Order *681*

4. For in Convictions what appears upon Evidence will not supply the Defects of the Charge *vide 485, 381*

See also *Convictions and Indictments.*

Wager

The TABLE.

W

Wager of Law.

1. **L**IES not in Debt on a By-Law, nor in any Action where a Wrong is supposed *Page 683*
2. In Debt it lies only where the Contract is secret, and not where founded on any thing notorious *ibid.*
3. In Account it lies where the Receipt was by the Defendant of the Plaintiff, but not where by or of a third Person *ibid.*
4. But in Detinue it lies, whether the Receipt was of the Plaintiff or of a Stranger *ibid.*
5. In Debt or Arbitrament where the Submission was by Parol, the Defendant may wage his Law *ibid.*
6. So in Debt for an Amercement in a Court-Baron, but not on a Judgment in a Court-Baron *ibid. 684*
7. That it lies not in Debt for Rent, and the Reason thereof *684*
8. Nor in Debt by a Gaoler for Meat and Drink *ibid.*
9. See the Method of performing Wager of Law *682*

Wages, vide Master and Servant.

Warranty.

1. *Cestuy que Use* may take Advantage of a Warranty annex'd to the Estate *685*
2. Plaintiff in Ejectment may make Title by a collateral Warranty *ibid.*
3. Rights of Entry are bound by collateral Warranty *686*
4. But tho' a Warranty binds or bars, it does not extinguish a Right *686*

Waifs, Estrays, &c.

1. Owner of a Stray may seize it tendring Satisfaction *Page 686*
2. And in Pleading need not shew the Sum tendred *ibid.*

Weights and Measures.

1. In Indictments for making light Bread, 'tis not enough to shew that it had not its due Weight, *sans* shewing what is due Weight *687*
- See also Fairs, &c.*

Wills.

1. The Attestation of a Will good within the Statute of Frauds, if the Testator might see the Witnesses sign, tho' he did not *688*
 2. A Will made by a *Feme* in pursuance of a Power reserv'd before Marriage, is not properly a Will, nor proveable by the Ordinary *313*
 3. Special Verdict finding a Will of Lands, and that afterwards the Testator made *aliud Testamentum*, imports not any Revocation of the former *592*
 4. Yet a Will of personal Estate was presum'd to be revok'd by Alteration of the Testator's Circumstances *ibid.*
 5. So a real Estate, purchased after the Will made, is not thereby devised *257*
 6. Legatee may be a Witness against a Will, but not for it *691 vide 547*
 7. Words founding conditional are to be taken as Limitation in a Will *570*
 8. See a Prohibition denied as to Probate of a Will of Lands and Goods, tho' *Non Compos* suggested, &c. *552 vide 547*
- See also Age, Devises, Distribution, Executors and Legacies. Witnesses.*

The TABLE.

Witnesses.

1. Where Perjury, &c. may be given in Evidence to the Credit of a Witness Page 514, 689
2. 'Tis the Nature of the Crime and the Conviction, not the Punishment, that makes a Witness infamous 690
3. Yet queried whether the Infamy arises from the Crime, or Judgment of the Pillory 689
4. For the King may pardon a Disability, where 'tis only the Consequence of the Judgment 514, 689
5. But not where 'tis Part of the Judgment; yet a Statute-Pardon will ibid.
6. A Prisoner having escaped, may be a Witness to prove the Escape voluntary on Traverse of an Inquisition against the Gaoler 690
7. Deposition of a Witness examined before a Judge, because going beyond Sea, can't be read, if he be in England 691
8. Nor can Commissioners of Appeals proceed upon Depositions taken before Commissioners of Excise, but must examine the Witnesses again *de Novo*, unless dead 555
9. A Prohibition to a Suit for a Legacy, for refusing Proof of Payment by one Witness; *aliter* in Probate of Wills, &c. 547
10. Note; A Legatee may be a Witness against a Will, but not for it 691

See also *Evidence and Proof*.

Withernam, vide *Replevin*.

Words sueable in the Spiritual Court, &c. or not.

1. Words sueable in the Spiritual Court, viz. *Whore-master, Whore, Wirtal, Brandy-nos'd Whore* Page 692, 693
2. Words not sueable there, viz. *Impudent, Brazen-fac'd, Belzebub or Devil, or Prince of Darknefs*, because no Discredit 692
3. Not for calling one *Knave*, &c. 548
4. Also Suit lies not in that Court for Words charging an Offence, not punishable there 691
5. As saying of a Parson, *He has no Sense, is a Dunce and a Block-head, and deserves to have his Gown pulled over his Ears* ibid.
6. Nor where Words of Spiritual Conuzance are coupled with others of a Temporal Crime 552
7. As, *Thou art a Whore and a Thief, or keep'st a Bawdy-house*; tho' *Whore* alone is sueable there ibid.
Vide 404
8. Words importing any Charge of Incontinency, are sueable there 693, 696
9. Court of Honour can't hold Plea of scandalous Words. 553

Words actionable at Law, or not.

1. In Offices of Profit, Words importing Want of Ability are actionable 695
2. But not in Offices of Honour, as calling a Justice of the Peace, *Ass*, or *Beetle-headed Justice* ibid.
3. *There goes your rare Chancellor to suborn Witnesses to swear against the Parson, actionable per Holt*, sed *Cur' divid.* 696

C c

4. Words

The TABLE.

4. Words subjecting a Man to Punishment, may not be actionable, unless scandalous Page 696

5. As, *Thou art one that stole my Lord S.'s Deer*, are not; nor *Papist*, but with Respect to the Times *ibid.*

6. A Charge of *Fornication*, &c. is not actionable, unless special Damage 693

7. Nor, *She is a Whore, and had a Bastard by her Father's Apprentice* 696

8. Nor, *She had a Bastard*; because it don't appear to be chargeable to the Parish 694

9. Nor, *You are a Cheat*, spoke of a Tradesman, without laying a *Colloquium* of his Trade ibid.

10. Nor of a Butcher, *That the Cow died of Calving*, tho' laid *per quod* he lost his Customers 693

11. But to say, *You stole my Box-Wood, and I will prove it*, is actionable 695, 696

12. So to say of a Justice and Deputy Lieutenant, *Don't vote for him, for he is a Jacobite, and for bringing in the Pretender*, &c. 694, 695

13. To say, *In Black-Bull Yard you could procure broad Money for Gold, and clip it*, because it imports an Act done 697

Words indictable, or not.

1. Words of Slander spoken of a Mayor, not indictable 697

2. As, *You are a Rogue and a Rascal*, &c. *aliter* if written Page 697

3. So spoken of a Justice of the Peace, *He is a Fool, an Ass, a Comb*, &c. not indictable 698

4. But are good Cause to bind to the Good Behaviour ibid.

See also *Libels* and *Variance*.

Writs.

1. In all continued Writs, the *Aliar* must be tested the Day the former Writ was returnable 699

2. A Writ bearing *Teste* out of Term is void, but the Sheriff is justifiable 700

3. A Writ of Execution returnable two Terms from the *Teste* is well, but *Mesne Process* is void ibid.

4. Defendant can't take Advantage of an ill Original by the Recital, but upon *Oyer*, or a *Certiorari* 701

5. A Writ of *Mandamus* ought to be directed to the Persons who are to do the Act, *vide Mandamus* 699, 701

6. See a *Ne exeat Regnum* to stay a Man's going to Scotland since the Union 702

See also *Certiorari*, *Habeas Corpus*, *Homine Replegiando*, *Returns of Writs*, and *Scire Facias*.



F I N I S.